Winter 1992

State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules

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I. INTRODUCTION***

Professional ethics rules have become the vortex of an increasingly bitter conflict between federal law enforcement officials and the defense bar, generally supported by state bar associations, together with the American Bar Association [hereinafter the "ABA"].[1] The criminal justice system provides the most dramatic current instances of this conflict.[2]

The clash between the bar and the Justice Department has developed on two fronts. The first involves the "anti-contact" rule, the ethics rule that prohibits lawyers from communicating directly with persons represented by counsel.[3] Here the Justice Department sparked the con-

*** For convenience, the authors have used the feminine gender throughout when referring to criminal defense lawyers and the masculine gender when referring to prosecutors or criminal defendants.

1. Although state and local prosecutors have joined the fray, *see* Joint Press Release from the U.S. Dep't of Justice, the Nat'l Ass'n of Att'ys General, and the Nat'l District Att'ys Ass'n (Aug. 6, 1990) [hereinafter Joint Press Release of Aug. 6, 1990], and many of the arguments herein apply equally to them, this article focuses primarily on the conflict from a federal perspective. For convenience we refer throughout to the ABA and other bar associations defending state ethics rules as "the bar" and to federal law enforcement officials as "prosecutors" or "federal prosecutors."

2. These conflicts are not confined to the criminal justice field. *See infra* notes 186-97 and accompanying text. One longstanding area of conflict—civil liability of lawyers to non-client third persons for activities performed on behalf of a client—has its current manifestation in the savings and loan crisis. *See infra* note 73 and sources cited therein.

3. This rule, referred to herein as the "anti-contact rule," is in effect in all jurisdictions in one form or another. The most common version of the rule is Rule 4.2 of the Model Rules of Professional Conduct [hereinafter the "Model Rules"] which provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983). DR 7-104(A)(1) of the Model Code

troversy, reacting to expansive interpretations of the rule urged on courts—successfully, in some cases—by declaring its lawyers exempt from interpretations of the rule that expand the rule's traditional scope.[4] The second front involves the "subpoena" rule, a more recently promulgated rule that prohibits prosecutors from subpoenaing attorneys without prior judicial approval granted after an adversarial hearing.[5] The criminal defense bar led the attack in this dispute, seeking to avoid the effect of statutory and decisional law that allowed prosecutors to identify and seize criminal defendants' assets—implemented in part through the use of subpoenas to attorneys—by arrogating the matter to the province of professional ethics.[6]

The bar, particularly the criminal defense bar, asserts that prosecutors' use of certain investigative and prosecutorial tools is unethical, because it is a deliberate effort to interfere with the lawyer-client relationship and to deprive clients of counsel of their own choice. The bar threatens prosecutors with the use of professional discipline against those who engage in certain longstanding investigative practices, such as contacting a person who is represented but unindicted, or talking with a represented person at that person's request. The defense bar is particularly vigorous in asserting that "prosecutorial misconduct," in the form of alleged violations of the anti-contact and other professional rules, provides grounds for sanctions in addition to professional discipline of prosecutors. Proposed sanctions include the exclusion of evidence and the reversal of convictions, despite the fact that such conduct may violate neither the Fifth nor Sixth Amendments.

The law enforcement community argues that expansive applications of ethics rules interfere substantially with legitimate law enforcement, serve the interests of lawyers rather than clients, and furnish a covert method of circumventing other decisional law. At the extreme,

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of Professional Responsibility [hereinafter the "Model Code"] is substantially identical to Rule 4.2. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1969); *see also* CANONS OF PROFESSIONAL ETHICS No. 9 (1908). For general discussion of the anti-contact rule see CHARLES W WOLFRAM, MODERN LEGAL ETHICS 611-15 (1986); John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. REV. 683 (1979).

4. *See infra* notes 88-96 and accompanying text.

5. *See infra* notes 285-306 and accompanying text.

6. *See infra* notes 285-306 and accompanying text. The developments are chronicled in a 1990 congressional report. *See* HOUSE COMM. ON GOV'T OPERATIONS, FEDERAL PROSECUTORIAL AUTHORITY IN A CHANGING LEGAL ENVIRONMENT: MORE ATTENTION REQUIRED, H.R. REP. NO. 986, 101st Cong., 2d Sess. 31 (1990). Increased funding for federal law enforcement has increased the number of lawyers employed by the Department of Justice to about 7,300. *Id.*

the Justice Department asserts that state ethics rules, formulated by a process in which bar associations occupy a privileged position, are improperly invoked to displace the constitutional and statutory authority of the federal grand jury and the executive branch, and case law involving a defendant's rights in federal criminal proceedings. The latest skirmishes in this continuing struggle have produced two recent decisions dramatically illustrating the positions of the contending partisans.

United States v. Lopez[7] involved contact between an indicted defendant represented by counsel and a federal prosecutor who, after obtaining approval of a judicial officer, met with the defendant without the consent or presence of his lawyer. The defendant, whose lawyer had conditioned his representation on the defendant forgoing plea negotiations, sought plea negotiations and waived his lawyer's presence, stating that the lawyer was not acting in his best interests.[8] After the plea negotiations failed and the defendant's lawyer resigned, the defendant's successor counsel moved to dismiss the indictment for violation of a California ethics rule (also adopted by local rule of the U.S. District Court for the Northern District of California) that prohibits a lawyer from communicating with a represented party without the consent of that party's lawyer. The district court dismissed the indictment on the ground that the prosecutor's communications with the represented defendant violated the "widely accepted and time-honored" anti-contact rule.

> [T]he Attorney General has issued a policy directive instructing attorneys of the Department of Justice to disregard a fundamental ethical rule embraced by every jurisdiction in this country. In the case at bar, the Attorney General's policy resulted in both the intentional disregard of the court's Local Rules by an Assistant United States Attorney and the loss by defendant of his counsel of choice. The Department of Justice, invoking the separation of powers doctrine, now seeks to render the court powerless to enforce its own rules and to protect the integrity of the criminal justice system.
>
> This court will not allow the Attorney General to make a mockery of the court's constitutionally-granted powers. . . .[9]

The second case, *Baylson v. Disciplinary Board of the Supreme Court of Pennsylvania*,[10] involved the practice of subpoenaing lawyers.

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7. 765 F. Supp. 1433 (N.D. Cal. 1991). The *Lopez* case is discussed more extensively *infra* at notes 243-64 and accompanying text.

8. *Id.* at 1438-39, 1442.

9. *Id.* at 1461.

10. 764 F. Supp. 328 (E.D. Pa. 1991). The *Baylson* case is discussed further *infra* at notes 334-38 and accompanying text.

The Pennsylvania Supreme Court, at the behest of the state bar association, adopted an ethics rule requiring government lawyers to secure judicial approval before subpoenaing lawyers.[11] The United States Attorneys in Pennsylvania challenged the validity of the new state ethics rule as a basis for the discipline of federal prosecutors. The state rule, which had become a local rule of the federal district courts in Pennsylvania despite efforts by those courts to except the rule from automatic incorporation, was defended by the state disciplinary board and in an amicus brief submitted by the state bar association. Thus the Department of Justice was arrayed against the defense bar and the bar generally.

The district court held that Pennsylvania could not discipline federal prosecutors for violating the state's subpoena rule. The subpoena rule could not be applied to federal prosecutors practicing in the state because it was inconsistent with several provisions of the Federal Rules of Criminal Procedure, the well-established federal decisional law dealing with the attorney-client privilege, the constitutional function of the federal grand jury, and congressional policies concerning federal law enforcement.

> . . . The state is of course free to fashion its own procedures so long as it does not transgress applicable constitutional values. But interposing the strictures of [Pennsylvania's subpoena rule] into the federal sphere is another matter entirely. . . . It distorts evidentiary privileges, disrupts existing subpoena practice, and compromises the authority and function of the modern grand jury. In consequence, Rule 3.10 is without vitality in the district courts of Pennsylvania, and the state may not sanction prosecutors who fail to adhere to it when they are working in those fora.[12]

This article deals with these two controversies. In both disputes, the conflict centers on the lawyer-client relationship and the availability of information to law enforcement officials. And in both, the profession's normative vision of lawyering departs from that generally embodied in the state's positive law.[13]

The first problem is a complex one involving the anti-contact rule, a state ethics rule that, unlike the subpoena rule, is well established

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11. PA R.P.C 3.10 (1988), *reprinted infra* at note 334.

12. *Baylson*, 764 F. Supp. at 349.

13. "Positive" law refers to state substantive and procedural law that confers rights and duties upon citizens in contexts other than regulation of the legal profession. "State" is used here in the general sense of a government, state or federal, that exercises coercive power to enforce law.

and widely accepted.[14] It arises, for example, when a federal regulatory agency seeks to acquire information about possible civil or criminal violations by conducting informal interviews with employees of a large corporation; the corporation, which is regularly represented by counsel, claims that these interviews may not proceed because the anti-contact rule treats or should treat these employees as the opposing, represented "party." Or, in the context which has aroused the defense bar and the ABA the most, when federal law enforcement officials talk with a suspect or an accused, knowing that he is represented by a lawyer in that or another matter, without the lawyer's consent. This was the case in *United States v. Lopez*.[15]

The controversy involving the anti-contact rule largely involves an expanded application of the rule to situations that formerly were considered to be outside the rule or within the exception for contacts "authorized by law."[16] The growing lack of uniformity in interpreting state ethics rules on this subject, coupled with aggressive efforts by counsel for corporations and potential defendants to expand its application, have created substantial problems for law enforcement officials. The possible conflict between state ethics law and general legal principles applicable in federal courts is complicated by the fact that most federal district courts have adopted local rules containing one form or another of the anti-contact rule. The uniform enforcement of federal criminal law is threatened by a decisional law that is confused and inconsistent.

The second situation involves the subpoena controversy, in which groups of lawyers who were largely unsuccessful in presenting their claims to federal courts and Congress obtained the assistance of bar associations in persuading some state supreme courts to deter subpoenas to lawyers by imposing an ethical responsibility on prosecutors not to seek them unless certain conditions were met. This was an effort to vindicate the profession's normative vision of a lawyer's immunity from ordinary legal processes, against the positive law of the state (federal decisional law in this instance). In essence, a new source of law—a state ethics rule prohibiting the issuance of a subpoena to a lawyer without prior judicial approval—was created to suppress the day-to-day behavior of prosecutors that the law directly applicable to that activity upheld and even encouraged. There are special questions, which may

14. *See supra* note 3.

15. 765 F. Supp. 1433 (N.D. Cal. 1991). *See supra* notes 7-9 and accompanying text.

16. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983). *See infra* notes 223-39 and accompanying text.

also arise in the context of the anti-contact rule, as to the authority of state and federal district courts to adopt a rule that may impair the functioning of federal grand juries or federal prosecutors, which are protected by positive law.

Part II of this article examines the larger backdrop against which state ethics rules should be interpreted. As a preliminary matter, one might question the use of ethics rules as rules of law in criminal trials. An examination of this issue prompts further questions about the rule-making process and the role bar organizations play in formulating ethics rules. Beyond these matters, there is the federalism aspect of these controversies: the possible conflict between federal law enforcement policies and the policies underlying state ethics rules. To what extent should the interests and policies of the larger legal framework be taken into account in interpreting and applying ethics rules? In yet another guise, the issue is one of separation of powers; the conflict involves issues of hierarchy and supremacy within the federal government. Do the anti-contact and subpoena rules constitute aspects of the control of lawyer behavior that lies within the inherent authority of federal district courts? Or do these rules, as sometimes interpreted and applied, regulate the federal criminal process in a manner that is inconsistent with federal statutes, the Federal Rules of Criminal Procedure, federal decisional law concerned with an accused's right to counsel, and the constitutional authority of the grand jury and the executive branch?

In the background lies the tension between the legal profession's normative vision of lawyering and the competing vision of law pursued by prosecutors and usually shared by courts.[17] The interplay of ethics "law," whether embodied in state ethics rules or in federal district court rules, with other more broadly authoritative principles of federal substantive and procedural law raises interesting and complex questions of legal authority in a world in which there are numerous lawmakers exercising sometimes conflicting public and private authority. Should bar associations, which exercise large influence over the ethics rulemaking process at the local level, have a privileged position in carving out rules that channel federal law enforcement activity?

Part III deals with the controversy in which defense lawyers and the corporate bar have attempted to restrict fact-gathering activities of federal law enforcement personnel by use of the anti-contact rule. This

17. *See* Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. (forthcoming 1992) (arguing that the bar's vision of the law of lawyering departs in fundamental ways from the positive law enforced by the state).

section analyzes various rationales for the rule, judicial interpretations of the rule, and the roles of the Fifth and Sixth Amendments in shaping applications of the rule. We conclude that the anti-contact rule should be interpreted to permit pre-indictment investigatory contacts with a represented person, when overreaching is not involved and when the contact does not involve a direct approach by the prosecutor concerning the subject matter of the representation. Direct contact after indictment should be permitted only if it occurs at the initiative of the represented person and with the court's permission.

Part IV discusses the controversy arising out of the increased use of subpoenas to lawyers. After analyzing the interaction of the subpoena rule with the Sixth Amendment right to assistance of counsel, the Federal Rules of Criminal Procedure, federal grand jury law, and the law of attorney-client privilege, we conclude that the subpoena rule, either as a state ethics rule or as part of a district court's local rules, is an impermissible effort to override controlling principles of federal law.

II. Some Interpretive Considerations

The issues discussed in this article have important implications concerning the status of professional ethics rules as law and the factors to be considered in framing ethics rules and applying them. Although the profession initially formulates ethics rules in an attempt at self-regulation, it is the courts that, as external governors of the profession, must give ethics rules the force of law in disciplinary proceedings. Likewise, courts must decide whether and to what extent ethics rules have authoritative force in other contexts.

Four developing themes deserve preliminary treatment: first, the transformation of professional ethics into law; second, the partial shift from self-regulation of the profession to external governance; third, the tension between the profession's vision of the law of lawyering and the law that is enforced as the positive law of the state; and fourth, the troubling balkanization of the standards governing lawyers whose practices routinely cross state lines and involve the enforcement of federal law in federal courts. The controversies over the application of the anti-contact rule and the subpoena rule to federal prosecutors provide dramatic evidence of these developments and tensions. But their relevance here is largely as factors that should be taken into account in the interpretation and application of these and other ethics rules.

A. The Transformation of Ethics into Law

One hundred years ago, when bar associations first began to put professional ethics into written form, it was taken for granted that ethical codes were hortatory and aspirational in character. "Ethics" was above and largely outside of "law."[18] To be sure, ethics codes contained prohibitions along with normative guidelines and aspirational commitments. But ethics rules were intended to govern the conscience of the individual lawyer and to be enforced largely by peer pressure. As late as 1970, the preamble to the ABA Model Code stated that

> in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction.[19]

Even in judicial review of disciplinary proceedings, the binding legal standards often came from well-established rules of agency, fiduciary, and criminal law.[20] Although courts referred to ethics codes, the ethical prohibitions they enforced largely duplicated legal standards of conduct.[21] Bar associations went out of their way to limit their discus-

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18. The sharp separation of "law" from "ethics" and "morality" is one of the principal teachings of American legal realists from Holmes to Llewellyn. In *The Path of the Law*, Holmes spoke about the dangers of viewing law in moral terms, of the separation between the hard fact of positive law and the softer values of background morality. Oliver W. Holmes, *The Path of the Law*, 10 HARV L REV. 457, 459-62 (1897). This view of ethics as distinct from law, as internalized standards of behavior above and outside of the law, is captured in a talk given by Chief Justice Earl Warren in 1962: "In civilized life," Warren said, "Law floats in a sea of Ethics. . . . Society would come to grief without ethics, which is unenforceable in the courts and cannot be made part of law." Speech by Earl Warren to Jewish Theological Seminary of America (Nov. 11, 1962) *quoted in* Ivan Hill, *The Meaning of Ethics and Freedom*, *in* THE ETHICAL BASIS OF ECONOMIC FREEDOM 5 (Ivan Hill ed., 1976). Although the sharp separation of law and ethics or law and morality suggested by Warren's comment is no longer generally accepted, the history of ethics rules reflects this dichotomy.

19. MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmbl. (1969).

20. *See* Ellen S. Podgor, *Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession*, 61 TEMP. L REV. 1323, 1335 & n.84 (1988) *and cases cited therein* (even in disciplinary hearings, ethics rules are generally used as guidance of proper conduct, with the courts specifically stating that they are not rules of law); Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7 (discussing the usefulness and status of lawyer ethical codes); George L. Hampton, IV, *Toward an Expanded Use of the Model Rules of Professional Conduct*, 4 GEO J LEGAL ETHICS 655 (1991) (urging an expansive use of disciplinary rules as authoritative sources of law in malpractice and other contexts).

21. Professional discipline is often based on a lawyer's conviction of a serious crime and on intentional breaches of duties owed to clients or the courts. In these situations the ethics rules often are merely a cross-reference or duplicate of positive law governing crimes, frauds, agency relationships, or court procedure. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule

sion and authority in ethics opinions to the ethical realm and avoided addressing questions of law.[22] Despite the gradual reformulation of ethics codes as authoritative statements of disciplinary requirements (and therefore a part of formal law), these characteristics continue in muted form to the present day.

Since about 1930, with accelerating speed since 1970, ethical codes have developed into law.[23] Professional discipline began the century as a clubby and fraternal process in which bar associations admonished and occasionally dismissed their members. Over time, it became a more elaborate process by which the state, through the judicial system and organs operating under its auspices, exercised formal legal authority.[24] Courts more frequently referred to ethical prohibitions as controlling legal standards in disciplinary proceedings and in other contexts, such as malpractice cases.[25]

This development in turn generated a demand on the part of lawyers for a distinction in the codes between mandatory legal requirements and purely ethical (and nonbinding) guidelines. The ABA responded to this demand in 1970 when it adopted the Model Code of Professional Responsibility, which distinguished sharply between Ethical Considerations (designed to "point the way to the aspiring") and Disciplinary Rules (designed to "judge the transgressor").[26]

The character of professional codes as codes of prohibited conduct evolved further in the Model Rules of Professional Conduct, which the

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8.4(b) (1983) (providing for discipline for commission of a crime reflecting adversely on "the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."). For discussion of the grounds of discipline, see WOLFRAM, *supra* note 3, at 85-98.

22. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 6 (1975) ("The Committee will not issue opinions on questions of law, or pertaining to conduct which is the subject of pending litigation."). As disciplinary rules have become more "law-like" these expressions are disappearing.

23. *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239 (1991) (arguing that during the last twenty-five years ethical rules have ceased to be internal professional norms but have become formal legal rules enforceable in the disciplinary process); Murray L. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RES. J. 953 (arguing that the Model Rules represent a culmination of "the shift from articulating professional standards, suffused with ideas of morality and ethics, and enforced if at all by informal sanctions and peer pressure, to enacting comprehensive and explicit legislation attended by formally imposed sanctions for breach").

24. For discussion of disciplinary procedure, see WOLFRAM, *supra* note 3, at 99-117; Geoffrey C. Hazard, Jr. & Cameron Beard, *A Lawyer's Privilege Against Self-Incrimination in Professional Disciplinary Proceedings*, 96 YALE L.J. 1060 (1987) (surveying the change in disciplinary process from fairly summary proceedings to more elaborate trial-type hearings).

25. *See infra* note 39.

26. MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmbl. (1969).

ABA adopted in 1983. The Model Rules more nearly resemble a statutory code of conduct in which imperatives, cast in the terms "shall" or "shall not," define conduct for purposes of professional discipline.[27] Most of the material dealt with in the Model Code's Ethical Considerations disappeared, although some were transformed into binding disciplinary rules. The Model Rules confer a great deal of discretion upon individual lawyers by permissive provisions, generally cast in the term "may." But even in these instances the Rules have legal consequence: "No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion."[28]

The effort to express ethics rules in the form of binding legal codes also involved a movement from professional agreement on aspirational standards of lofty generality to disagreement concerning specific legal requirements.[29] For example, the difference of opinion within the profession on disclosure of client fraud (the consequence of a lawyer's discovery that a client has used or is in the process of using the lawyer's services to defraud a third person) was formerly submerged, with the ethics rule expressing one position and interpretive opinions taking a contrary view.[30] This discord became apparent during the process of drafting the Model Rules. While the drafting committee attempted to take the consistent position that a lawyer's disclosure duties extended to both the tribunal and to third persons, the ABA House of Delegates was deeply divided. Eventually, it supported disclosure of fraud on a tribunal (i.e., client or witness perjury), but not fraud on third persons (i.e., fraudulent transactions).[31] The result of the profession's effort to

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27. MODEL RULES OF PROFESSIONAL CONDUCT scope note (1983).

28. *Id.*

29. *See* Robert Cover, *The Supreme Court, 1982 Term—Foreword, Nomos and Narrative*, 97 HARV L REV. 4, 45 (1983).

30. The text of the Canons of Professional Ethics [hereinafter the "CPE"], the precursor of the Model Code in effect from 1908 to 1970, strongly suggested that the lawyer had a mandatory duty to disclose both past and ongoing fraud, but ABA ethics opinions took the contrary position that the duty of confidentiality prevailed. *Compare* CANONS OF PROFESSIONAL ETHICS No. 41 (mandatory duty to disclose both past and ongoing fraud) *with* ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953) (disclosure of client perjury in a civil case would violate duty of confidentiality). The ambiguity persisted under the Model Code, which stated a duty to disclose (later limited by an amendment which is in itself ambiguous), but led to ethics opinions stating that confidentiality prevailed. *See* GEOFFREY C. HAZARD. JR. & SUSAN P. KONIAK. THE LAW AND ETHICS OF LAWYERING 282-84 (1990) (discussing Model Code DR 4-101 (duty of confidentiality), DR 7-102(B)(1) (duty to disclose client fraud), and ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975) (interpreting an amendment to the latter rule), and concluding "the Code position on client fraud is almost totally incoherent").

31. *See* Ted J. Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules*

define itself as a distinct community with a normative vision is embodied in its professional ethics rules that are, as this example illustrates, at odds in important respects with the formal law of the state. The discord this produces within the profession is papered over by assertions that conceal the underlying tensions.[32]

As ethics codes assume the form of law, the profession and the courts increasingly treat them as law for some purposes. At least for purposes of professional discipline, they are an important source of authoritative law. Their relevance in contexts other than professional discipline, however, remains uncertain.

The bar has generally taken an internally inconsistent and result-oriented position on this subject. Typically, the bar argues a restrictive view concerning the ethics rules as a source of authoritative law.[33] This

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of Professional Conduct, 1989 J. L. & SOC. INQUIRY 677, 702-05, 718-21 (discussing the controversy over Model Rules 1.6 and 3.3 dealing with, respectively, disclosure of client fraud and fraud on the tribunal). The successful effort to eliminate this disclosure option "reflects a fear that, unlike the earlier ABA codes . . ., the Model Rules were going to have real legal bite. . . . [C]ourts today would be likely to turn any ethical right to disclose confidences into a legal duty to do so to protect third parties . . . ." *Id.* at 720. *See also* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 600-01, 608, 611-16 (1985). The conflicting visions of lawyering maintained by the profession and the state, discussed *infra* at notes 414-40 and accompanying text, is further illustrated by the fact that many state courts rejected the bar's view of its obligations and adopted ethics rules with greater disclosure permissions and requirements. See HAZARD & KONIAK, *supra* note 30, at 292 for a tabular presentation of state differences.

32. In August 1991 the ABA House of Delegates rejected an amendment to Model Rule 1.6(b) that would have permitted explicitly what is permitted indirectly and more narrowly by a comment to the original rule: disclosure of client confidential information "to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used." The proposal by the ABA ethics committee, which had found the existing situation "unworkable," was rejected by a 251-158 vote. 7 Laws. Man. on Prof. Conduct (ABA/BNA) 258 (Aug. 28, 1991). For discussion of the profession's efforts to maintain community in the face of forces tearing it apart, see Koniak, *supra* note 17 (manuscript at 168-82).

33. Ted Schneyer's masterful account of the process that resulted in the Model Rules recounts the concern of the drafters and various bar groups that any disciplinary rule might have other legal consequences. "The process was rife with pleas for rules that would curb or at least not foster malpractice claims, motions to disqualify, denials of legal fees, exposure under the securities laws." Schneyer, *supra* note 31, at 725. *See also* Rhode, *supra* note 31, at 616.

The bar's effort to limit the use of ethical rules as a source of law in contexts other than professional discipline has been only partly successful. Ethical rules are admissible in malpractice actions and, over bar opposition, are sometimes treated as establishing the professional standard to which the lawyer is held. *See infra* notes 37-39 and accompanying text. Ethical rules are also discussed and often relied upon in conflict-of-interest cases involving disqualification motions, although courts are reluctant to enforce the ethics rules vigorously because of the burden imposed on clients. *E.g.*, Premium Products Sales Corp. v. Chipwich, Inc., 539 F. Supp. 427, 435 (S.D.N.Y. 1982) ("unless the integrity of the action currently before the court is threatened . . ., the courts must refrain from imposing the burdens of an attorney disqualification on a client and leave the matter to state or federal disciplinary proceedings.").

is especially so when the civil or criminal liability of a lawyer is involved. The text and comments of the Model Rules attempt to cabin the authoritative effect of ethical rules to the disciplinary context. Violation of a rule "is a basis for invoking the disciplinary process," but the rules are "not designed to be a basis for civil liability," or "to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating [a] duty."[34] The preamble expresses concern about the use of the rules as a "procedural weapon" "invoked by opposing parties."[35]

On other occasions the bar takes an expansive or imperial position concerning the application and dominance of the ethics rules. The defense bar, sometimes with ABA support, claims that the anti-contact and subpoena rules create duties in other contexts, enforceable not only outside of disciplinary proceedings, but by third parties as well (typically criminal defendants). Ethics rules are invoked in motions to exclude evidence obtained in violation of the anti-contact rule, to reverse convictions on the basis of such violations, and to quash grand-jury subpoenas directed to lawyers if the subpoena seeks information relating to a lawyer's clients. In light of the Model Rule language cited above, the schizophrenic quality of the bar's position appears in its support for broad application of the subpoena rule and the anti-contact rule, knowing that defense lawyers in civil and criminal contexts are using these rules for collateral purposes.[36]

The problem raised is a general one in applying and interpreting "law." A rule of law created for one purpose and enforceable by its terms in a particular manner may or may not be an authoritative legal standard in other contexts. A health and safety regulation, for example, providing on its face for criminal or administrative penalties is often taken as establishing the standard of care of an actor in a negligence action.[37] Trade or industry standards, on the other hand, are likely to

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34. MODEL RULES OF PROFESSIONAL CONDUCT scope note ¶¶ 5, 6 (1983).

35. *Id.* ¶ 6.

36. Bar associations have filed amicus briefs urging enforcement of the anti-contact rule or the subpoena rule in non-disciplinary contexts. *See infra* note 284. The ABA resolutions dealing with issuance of subpoenas to lawyers call for implementation measures. *See infra* notes 303, 305.

37.

> Probably a majority of American courts have adopted the rule that the unexcused violation of such a statutory standard is negligence per se, that is, negligence as a matter of law (to be ruled on by the court). In a substantial number of jurisdictions, such a violation is held to be evidence of negligence to be weighed by the jury.

3 FOWLER V HARPER ET AL., THE LAW OF TORTS § 17.6, 619-20 (2d ed. 1986); *see* RESTATEMENT (SECOND) OF TORTS §§ 286-88 (1965).

be viewed as admissible and relevant evidence of the appropriate standard of care to be considered along with other evidence, but are rarely if ever viewed as law.[38] Court decisions dealing with the effect of ethics code violations in malpractice actions against lawyers take a number of positions, often varying with the particular issue involved, but the usual approach is to consider the ethics rule only as relevant and admissible evidence of the professional standard, just as the custom of a trade or occupation may be relevant evidence of the appropriate standard of care.[39]

The transformation of ethics rules into "law" is significant in the context of the subpoena and anti-contact rules in two respects. The rules may create rights and duties enforceable in non-disciplinary contexts, and they frequently deal with matters as to which other controlling law already exists.

Although the anti-contact and subpoena rules are merely rules of professional discipline, it is extremely unlikely that disciplinary charges will be pressed against federal prosecutors in the types of situations discussed in this article. Disciplinary bodies have limited resources, which leads them to concentrate on egregious and intentional professional violations that harm the offender's client. Violations of the rules discussed here harm only the opposing party or that person's lawyer, if anyone. Disciplinary authorities are accustomed to leaving most issues of lawyer conduct to other remedial settings. Where a malpractice action or a sanction during the course of judicial proceedings is available,

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38. 3 HARPER ET AL., *supra* note 37, § 17.3 (a custom either to take or to omit a precaution is admissible as bearing on what is proper conduct in the circumstances, but is not conclusive).

39. Miami International Realty Co. v. Paynter, 841 F.2d 348 (10th Cir. 1988) (in Colorado a code violation is admissible but "does not create a private right of action"); Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir.), *cert. denied*, 449 U.S. 888 (1980) (ethics rule constitutes "some evidence" of required conduct in legal malpractice case); Lipton v. Boesky, 313 N.W.2d 163, 167 (Mich. App. 1981) (violation of the Code is rebuttable evidence of malpractice). Some cases contain overly broad statements that "[civil] liability must be based on a recognized and independent cause of action and not on ethical violations." Sullivan v. Birmingham, 416 N.E.2d 528, 534 (Mass. App. 1981); *see also* Ayyildiz v. Kidd, 266 S.E.2d 108, 112 (Va. 1980) ("the Code of Professional Responsibility is no basis for a private cause of action, although, of course, in an appropriate case, disciplinary proceedings can be instituted against the offending lawyer."). On some occasions, the ethics rule may be given a presumptive effect, treating it to an extent as law rather than merely as fact relevant to the required standard of care. *See generally* Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil litigation*, 30 S.C. L. REV. 281 (1979); WOLFRAM, *supra* note 3, at 51-53 (discussing relevance of ethics codes beyond lawyer discipline and citing relevant cases and articles); *see also supra* note 20 and accompanying text.

a disciplinary committee is unlikely to take action.[40] Finally, as this article discusses, there are serious questions involving the validity, interpretation, and wisdom of the two rules. Federal prosecutors acting in good faith in accordance with plausible interpretations of ethics rules are exceedingly unlikely to be disciplined.[41] Consequently, violations of the anti-contact rule result in professional discipline only rarely, and the same is likely to be true of the subpoena rule. Instead, opposing parties seek to enforce the rules by remedies of one kind or another (disqualification of counsel, exclusion of evidence, reversal of a conviction, dismissal of an indictment) in the judicial proceedings in which the alleged violation occurs. While such attempts to invoke ethics rules are negated by the rules themselves,[42] some courts have been receptive to these arguments.

The second important aspect of ethics rules as "law" is that other controlling law already exists to govern the conduct that ethics rules seek to regulate. Many disciplinary rules are restatements of well-established rules of agency law applicable to all agents. However, the anti-contact rule does not emerge from agency law, but overlaps, in purpose and application, the large body of law interpreting the Sixth

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40. *Cf.* HAZARD & KONIAK, *supra* note 30, at 181-82 ("Discipline for incompetence has been relatively rare. . . . Most cases involve either egregious and often repeated instances of incompetence or incompetence combined with other misconduct. . . . Court opinions often state that it is inappropriate to impose discipline for conduct that amounts 'only' to negligent malpractice."); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 976 (1984) (discipline unlikely where alleged misconduct is briefed and argued in appellate court as part of the errors on appeal); *see also* Susan R. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705 (1981) (arguing that legal malpractice action is needed because the bar has not been and will not be successful in dealing with incompetence).

41. Commentators report that even the most egregious prosecutorial misconduct, in violation of professional rules, generally does not result in disciplinary proceedings. *See* WOLFRAM, *supra* note 3, at 761 n.49 ("discipline is rarely visited on prosecutors"); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 49 (1991) (summarizing available evidence concerning professional discipline of prosecutors for misconduct); Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX L REV 629, 670-73 (1972) (discussing the failure of bar grievance committees to discipline prosecutors). As public officials, prosecutors are accountable to the electorate, if elected, or, if appointed, to their superiors. The Department of Justice has elaborate procedures for the review and discipline of allegations of misconduct of federal prosecutors. *See* 28 C.F.R. §§ 0.39, 45 (1990) (establishing Office of Professional Responsibility and establishing regulations governing attorney conduct). Although it is stated that these rarely result in dismissal for the offending lawyer, *see* H.R REP. NO. 986, 101st Cong., 2d Sess. 31-36 (1990), there are a much larger number of instances in which internal criticism and admonishment serve to set future standards of behavior.

42. *See supra* notes 33-35 and accompanying text.

Amendment right to counsel.[43] Likewise, the subpoena rule intrudes upon several bodies of federal law.[44] Thus, any court interpreting and applying ethics rules in contexts other than a disciplinary one must do so in light of other law. If ethics rules are to impose legal duties upon federal lawyers, those duties must harmonize with duties imposed by the Constitution, Congress, and the Attorney General.

B. The Continuing Influence of the Bar on Ethics Rules

During the period in which ethics rules have become disciplinary law, raising the question of their authority in other legal contexts, there has been a gradual shift from self-regulation by bar associations to external governance by courts.[45] Although one might expect this shift to lend greater authority to the ethics rules thus promulgated, three distinctive characteristics of state regulation of the legal profession argue against this conclusion: the lack of legislative involvement, the powerful role of the bar, and the lack of federal involvement. These characteristics suggest that a court interpreting or applying a state ethics rule should scrutinize it from a "public-regarding" perspective.[46] When federal interests are implicated, the public-regarding perspective must assess the weight of those interests.

Bar associations originated near the end of the nineteenth century, at about the same time that written formulations of ethics rules first appeared. The ABA began as and continues to be a purely private association of lawyers, but it exercises important public functions in connection with the accreditation of law schools and in recommending rules and standards for consideration by state bar associations and state and federal courts.[47] State and local bar associations also originated as

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43. *See infra* notes 128-57 and accompanying text.

44. *See infra* notes 344-92 and accompanying text.

45. Of course, judges are also lawyers, and so not wholly "external" to the legal profession, but their office is presumed to impose an obligation of impartiality that judges respect.

46. That is, from the perspective of the non-lawyer, in light of general public policy as reflected in other law.

47. Eligibility for the bar examination in most states is dependent upon graduation from a law school approved by the ABA. *See* ABA/NCBE, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, 1991-92, at 10-14 (1991). For discussion of the ABA's role in law school accreditation, see ABA Sec. of Legal Educ. and Admissions to the Bar, *The American Bar Association in the Law School Accreditation Process*, 32 J. LEGAL EDUC. 195 (1982). The ABA's role in the formulation of ethics rules is discussed as an instance of "de facto delegation of public lawmaking to private groups" in Schneyer, *supra* note 31, at 679. The ABA also has a special role in the process by which federal judges are nominated. *See* Public Citizen v. Department of Justice, 491 U.S. 440 (1989) (holding that ABA evaluation of qualifications of persons being considered by the

private associations, but from the beginning they have acted in conjunction with courts in admitting and disciplining lawyers. Increasingly, rule-making and adjudication involving entry into the legal profession, the nature and extent of the professional monopoly, standards of professional conduct, and enforcement of those standards in disciplinary proceedings, have come to be viewed as public functions. The trend toward some form of external governance, in which bar associations are not the sole or decisive actors, accompanied this shift in regulatory attitude.

The pattern varies in its details from state to state, but there are common elements. In most states, statutes or court rules require all lawyers to belong to the bar of the state in which the lawyer practices, and the bar in essence becomes a public agency.[48] The highest court of the state, exercising rulemaking authority derived from constitutional, statutory, or inherent judicial authority, generally is responsible for formulating ethics rules for lawyers, supervising the admissions and disciplinary process, and serving as the court of last resort in these matters.[49] The court appoints lawyers to bodies that carry out some of the delegated functions, and often responds to recommendations and reports submitted by the state bar. In promulgating new rules, courts have increasingly followed notice-and-comment rulemaking procedure, although they were late to apply to themselves the procedural safeguards that administrative procedure acts and judicial decisions required of other regulatory bodies.[50] There is also a trend toward including non-lawyers in the regulatory bodies (other than the court itself), and a strong movement away from secret decision-making.[51] In short,

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President for federal judicial nomination was not subject to Federal Advisory Committee Act).

48. Thirty-one states require membership in and payment of dues to a unified and integrated state bar. Laws. Man. on Prof. Conduct (ABA/BNA) § 201:301. *See generally* Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing From the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1.

49. New York is an exception: admission and discipline are vested in the intermediate appellate court (Appellate Division of the New York Supreme Court) rather than the high court (New York Court of Appeals). *See* WOLFRAM, *supra* note 3, at 70 n.31.

50. *E.g.* Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1988).

51. The final report of the ABA Commission on Evaluation of Discipline recommended that every aspect of the disciplinary process should be open to the public except for disciplinary action involving counsel's work product and the actual adjudicative deliberations. 7 Laws. Man. on Prof. Conduct (ABA/BNA) 142 (May 22, 1991). A prior ABA action had recommended the inclusion of non-lawyers on disciplinary boards. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 2(B) (1989). Although there is a trend toward inclusion of non-lawyer members on disciplinary bodies, the bar has a dominant voice in their selection, and they tend not to be zealous consumer advocates. *See* Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L.

the pattern of regulation to which the legal profession is subject now shares many of the characteristics of occupational regulation generally: external governance in which members of the profession are appointed to bodies that exercise official power, with the courts providing judicial review.

State regulation of the legal profession, however, has several distinctive characteristics that are relevant to the interpretation and application of state ethics rules. First, the negative implications of the inherent-powers doctrine—a curious and anomalous aspect of the law—purport to remove regulation of lawyers from legislative control.[52] A substantial number of states hold that the highest court has exclusive authority to deal with matters relating to legal services: admission to practice, regulation of competition within the legal profession and with outsiders, and discipline of lawyers both for in-court conduct and for matters unrelated to court proceedings.[53] Thus, the primary and most

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REV 274, 293 (1986).

52. The inherent powers doctrine has two aspects: an affirmative aspect that supports judicial authority to regulate lawyers without legislative authorization; and a negative aspect that treats the arena of lawyer regulation as the exclusive prerogative of the courts. *See* WOLFRAM, *supra* note 3, at 27-31; Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1 (1989-90).

53. *See, e.g.*, Hustedt v. Workers' Compensation Appeals Bd., 636 P.2d 1139 (Cal. 1981) (invalidating a statute authorizing administrative agency to discipline lawyers in agency proceedings).

Some states take a narrower view that some matters relating to legal services are appropriate for legislative action, and nearly all states uphold general legislation that affects transactions in which lawyers may be involved. Thus consumer or tax regulation applicable to the provision of services is generally held applicable to producers of legal services, just as general regulation of labor relations or discrimination in employment applies to law firms as employers. *E.g.*, Hishon v. King & Spaulding, 467 U.S. 69 (1984) (federal civil rights act prohibiting sex discrimination in employment was applicable to law firm's partnership decision); Heslin v. Connecticut Law Clinic of Trantolo, 461 A.2d 938 (Conn. 1983) (state unfair trade practices act held applicable to lawyers suspected of engaging in unfair trade practices; emphasis of disciplinary rules is ethical and regulatory, while the emphasis of the statute is on prevention of injury to the consumer of legal services). But, unlike the regulation of other occupations, state legislatures are limited by the inherent powers doctrine in regulating the legal profession.

Within the federal government, congressional authority to legislate concerning the procedure and operation of federal courts, including attorney regulation, is clear. The Judiciary Act of 1789, 1 Stat. 73, now 28 U.S.C. §1654, authorized the federal courts to regulate lawyers appearing before them. *See Ex Parte* Garland, 71 U.S. (4 Wall.) 333, 379 (1866) (stating that "the legislature may undoubtedly prescribe qualifications for the office" of lawyer). In New York the regulation of lawyers rests upon an extensive statutory base. *See* WOLFRAM, *supra* note 3, at 25 n.31. In other states, legislation regulating specific aspects of lawyering is often upheld either because it is not inconsistent with the court's inherent power, *e.g.*, State *ex rel.* Robeson v. Oregon State Bar, 632 P.2d 1255 (Or. 1981) (statute requiring lawyers to make payments to a professional liability fund did not burden or interfere with performance of judicial function), or because there is a

representative lawmaking authority—the legislature—is absent in the regulation of lawyers.

Second, bar associations retain a privileged and influential role in the formulation of professional standards.[54] Standards and model codes promulgated by the American Bar Association receive serious attention. State bars make studies and issue reports that tend to initiate rule-making consideration by the high court. The rule-making activities of the high court compete for time and attention with the steady flow of appeals to be adjudicated. Delegation of authority within the court to its chief or to a small group of judges, with substantial deference given to the extensive efforts that the state bar has already given to the subject, is common. The high court may not fully comprehend the policy significance of the matters presented, unless a strong division on something within the bar association resulted in alternative formulations or dissenting views.

Third, federal interests are either unrepresented or poorly represented in bar association deliberations.[55] Bar associations and courts alike regard lawyer regulation as a state matter.[56] Until relatively recently, such regulations largely escaped scrutiny for compliance with federal law.[57] It cannot be assumed that state ethics codes comply with

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necessary overlap between governmental functions, *e.g.*, Sadler v. Oregon State Bar, 550 P.2d 1218, 1221-22 (Or. 1976) (Public Records Law as applied to require public disclosure of state bar disciplinary records is not unconstitutional invasion of judicial function because it does not unduly burden or substantially interfere with judicial function).

54. Charles Wolfram states that

> lawyers, and *only* lawyers, now regulate the legal profession. Lawyers entirely control the process by which lawyer rules of conduct are written and adopted. In drafting disciplinary rules, every state to a greater (usually) or lesser (infrequently) extent follows the lead of the American Bar Association. Often states follow that lead slavishly. And only a lawyer would think that many of the departures are truly significant. The ABA calls the major shots and most of the minor ones.

Wolfram, *supra* note 52, at 16.

55. In the District of Columbia, a jurisdiction in which the interests of the federal government are more fully represented, the consequences are significant. The new D.C. ethics rules carve out a broad exception to the anti-contact rule, thereby protecting federal investigatory activity. The proposed rule requiring an advance hearing before issuance of a subpoena to a lawyer was rejected. *See infra* note 208; Monroe Freedman, *The Prosecutors' Ethical Stretch*, LEGAL TIMES, June 3, 1991, at 22 (complaining that special appeals from the Department of Justice were heeded by the D.C. Court of Appeals, which rejected recommendations of bar committees).

56. *E.g.*, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (federal court should abstain from interfering with state attorney discipline matters).

57. For example, it was not recognized that state regulation of attorneys is subject to federal antitrust law until 1975, *see* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), and likewise subject to the First Amendment until 1977, *see* Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

the letter of federal law, much less that they respect its underlying policies.

These three aspects of the governance process suggest that public interests may not be well represented in the rule formulation process. If these rules are to acquire the force of law in contexts beyond professional discipline, they must be interpreted and applied with an eye toward the public interests affected. This interpretive approach is illustrated by *Niesig v. Team I*:[58]

> We begin our analysis by noting that what is at issue is a disciplinary rule, not a statute. In interpreting statutes, which are the enactments of a coequal branch of government and an expression of the public policy of this State, we are of course bound to implement the will of the Legislature . . . . The disciplinary rules have a different provenance and purpose. . . . [T]he Code of Professional Responsibility is essentially the legal profession's document of self-governance . . . . While unquestionably important, and respected by the courts, the code does not have the force of law.
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> That distinction is particularly significant when a disciplinary rule is invoked in litigation, which in addition to matters of professional conduct by attorneys, implicates the interests of nonlawyers. In such instances, we are not constrained to read the rules literally or effectuate the intent of the drafters, but look to the rules as guidelines to be applied with due regard for the broad range of interests at stake.[59]

The failure to give sufficient attention to underlying policy issues seems particularly likely when a federal district court adopts an ethics code by local rule. The notice-and-comment procedures provided are very rudimentary; and consideration is rarely given to the multitude of serious policy issues that underlie the choice between one set of rules and another.[60] A set of rules generally is adopted in its entirety, with

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58. 558 N.E.2d 1030 (N.Y. 1990).

59. *Id.* at 1032 (citations omitted). *See also* S & S Hotel Ventures v. 777 S.H. Corp., 508 N.E.2d 647, 650 (N.Y. 1987) (effort to disqualify a law firm in litigation because one of its lawyers would be a witness "involves the interests of clients and others" in addition to professional ethics; "the Code provisions cannot be applied as if they were controlling statutory or decisional law"). New York differs from other states in that, even in the disciplinary context, ethics rules do not have the force and effect of law. *See* WOLFRAM, *supra* note 3, at 25 n.31. But the interpretive considerations apply without regard to this issue, since a court may interpret its own rules with greater freedom to balance their purposes against other values of the legal order.

60. In *United States v. Klubock*, in which an equally divided First Circuit upheld the validity of a state subpoena rule as incorporated in local rules of the federal district court, Judge Breyer argued that the local rule adopted by the district court after the initial decision in the case provided insufficient opportunity for public commentary and pointed out a number of problems posed by the rule that were ignored as a result of the lack of scrutiny. "Given the importance of the rule; the federal context; the state orientation of the Supreme Judicial Court's consideration; the potential interest of (and potential effect upon) third parties; adequate 'federal' notice and

its many parts receiving little or no consideration. District courts in a multi-district state may adopt one of the two sets of ABA rules, the rules of the state in which the district court sits, or no rules at all.[61] One common approach when a federal court adopts a state's rules is to provide for automatic adoption of any amendment to the state's ethics rules. This mechanism effectively prevents any consideration of underlying policies. Although a case can be made for either conformity to state law or a uniform federal approach, it is not clear that current choices represent anything other than whimsy of chief judges in the various districts.

C. The Tension Between the Bar's Law and the State's Other Law

Lawyers as a group tend to think of themselves as immune to some of the legal requirements that are applicable to others. Professor Susan Koniak argues with great force that lawyers view the law from an insider's perspective—the law is applicable to clients but has reduced application to them.[62] In a few respects the law does give special treatment to lawyers. The courtroom lawyer is given a tort immunity from liability for defamation of parties and witnesses that would be actionable if done by others.[63] The lawyer's function in the adversarial system requires this sphere of immunity, just as the effective performance of judicial and legislative roles leads to similar immunities for judges and legislators.[64] But lawyers often conceive of themselves as special in a broader sense, as privileged to retain or conceal physical evidence of

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comment would seem essential." United States v. Klubock, 832 F.2d 664, 672 (1st Cir. 1987) (en banc by an equally divided court) (Breyer, J., dissenting); *see also infra* notes 325-43 and accompanying text (further discussing *Klubock*). *Cf.* Baylson v. Disciplinary Bd. of the Supreme Court of Pa., 764 F. Supp. 328 (E.D. Pa. 1991) (discussing required notice and comment procedures and invalidating federal district court local rules for lack of compliance); *see supra* notes 10-12 and *infra* notes 334-38 and accompanying text (further discussing *Baylson*).

61. *See* Rand v. Monsanto Co., 926 F.2d 596, 600-03 (7th Cir. 1991) (tabulating the varied approaches of district courts in adopting ethics rules); Committee on Rules of Prac. and Proc., Jud. Conf. of the United States, Report of the Local Rules Project on Attorneys (Nov. 1987).

62. *See* Koniak, *supra* note 17 *passim*.

63. For discussion of the tort immunities of lawyers when acting in a representational capacity, see WOLFRAM, *supra* note 3, at 230-35 (absolute privilege for statements made during courtroom proceedings; conditional privilege for statements made in a client's interest that the lawyer reasonably believes to be true; and general refusal to impose liability on lawyers for knowing involvement in wrongful use of the judicial process); *see also* RESTATEMENT (SECOND) OF TORTS § 586 (1977); Imbler v. Pachtman, 424 U.S. 409 (1976) (broad immunity of prosecutors from damage actions for civil rights violations).

64. Tenney v. Brandhove, 341 U.S. 367 (1951); Stump v. Sparkman, 435 U.S. 349 (1978).

crime,[65] to remain silent when carrying out client actions that are known to be fraudulent or criminal,[66] or to be immune from process to which others are subject (e.g., subpoenas).

Apart from a few special rules, however, lawyers are subject to the same law that applies to others. Professional ethics, or the "bar's law," traditionally have been understood as relating to obligations apart from the requirements of the state's "other law." The adversarial ethic—commitment to the client's cause and zeal in its pursuit—is always limited by the proviso that the lawyer's representation must be "within the bounds of law."[67]

Although the bar accepts the postulate that its law merely supplements the state's other law, its acceptance is modified by the professional claim that a substantial arena of action should be left to professional self-regulation. As Koniak puts it, the profession's view is that "state law should 'leave off' sooner rather than later" in order to leave a substantial domain of activity governed exclusively by the bar's professional understanding.[68] The ongoing debate over the extent of professional self-regulation involves conflicting normative visions of the lawyer's role and the legal process espoused by the state and the bar.[69]

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65. *See, e.g., In re* Ryder, 381 F.2d 713, 714 (4th Cir. 1967) (lawyer disciplined for retaining instruments of crime; the lawyer "made himself an active participant in a criminal act, ostensibly wearing the mantle of the loyal advocate, but in reality serving as accessory after the fact"); People v. Meredith, 631 P.2d 46, 53 (Cal. 1981) (lawyer's testimony concerning the location of physical evidence of crime not protected from disclosure by client's attorney-client privilege because removal of evidence from original location "deprives the prosecution of the opportunity to observe that evidence in its original condition or location"); *but see* Commonwealth v. Stenhach, 514 A.2d 114 (Pa. Super. 1986), *appeal denied*, 534 A.2d 769 (Pa. 1987) (lawyer's failure to deliver physical evidence of crime to law enforcement officials did not violate general criminal statutes against hindering prosecution and tampering with evidence because the statutes were overbroad as applied to lawyers representing criminal defendants). Koniak argues that the *Stenhach* decision, and the subsequent refusal to discipline the lawyers for their concealment of physical evidence of crime, illustrate the strong commitment of the bar to zealous advocacy and the relatively weak commitment of the state to its general requirement that a lawyer not unlawfully suppress or conceal evidence. Koniak, *supra* note 17 (manuscript at 160-61).

66. *See, e.g.*, United States v. Benjamin, 328 F.2d 854, 862-63 (2d Cir.) (lawyer guilty of securities fraud when he "deliberately closed his eyes to facts he had a duty to see . . . or recklessly stated as facts things of which he was ignorant;" "[i]n our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar"), *cert. denied*, 377 U.S. 953 (1964); *see generally* Geoffrey C. Hazard, Jr., *The Duty to Rectify Client Fraud: Death and Revival of a Professional Norm*, 33 EMORY L.J. 271 (1984).

67. Koniak, *supra* note 17 (manuscript at 12).

68. *Id.* (manuscript at 14).

69. Koniak argues that "[t]he state and the legal profession have different understandings of the law governing lawyers." *Id.* (manuscript at 6). For many years there has been an ongoing

The dynamic interplay between the norms of the state and those of the bar is most evident along the fracture lines that are exposed when a central tenet of the profession's normative vision comes into conflict with state or federal law. An example of this occurred during the 1970s, when the corporate and securities bar waged a long war with the Securities and Exchange Commission over its effort to punish lawyers who facilitated transactions when they knew, or reasonably should have known, that their clients were not complying with federal securities disclosure laws.[70] Some years later, when the bar adopted the Model Rules of Professional Conduct, the most heated controversy involved the tension between the profession's central commitment to client confidentiality and the relatively clear decisional law holding that lawyers who assisted clients in defrauding third persons were subject to civil and criminal liability.[71] The resulting prohibition in Model Rule 1.6 of any disclosure of client fraud in a transaction involving use of the lawyer's services ignores this substantial body of decisional law.[72]

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contest between the profession's vision of this law and the state's. If the state is persistent in pressing its vision, its law trumps the profession's law, which is embodied in ethics rules, ethics opinions, and professional tradition. But the state's commitment to its law, especially when faced with concerted professional opposition, is often weak. As a result the differences are often concealed by accommodations that mute the conflict. "The state often speaks [when the law governing lawyers is involved] as if it were uncertain about whether its law should reign, and it demonstrates that uncertainty by refusing to use force against lawyers to vindicate the primacy of its law." *Id.* (manuscript at 149). Thus the profession is able to maintain its strong normative vision of its own law against that of the state.

70. In a number of celebrated cases the SEC brought charges against lawyers who assisted securities transactions even though they knew or reasonably should have known that their clients were violating the securities laws. *SEC v. Spectrum* held that a lawyer who negligently prepared an erroneous opinion used to sell securities could be enjoined from future violations of the securities laws. *See* SEC v. Spectrum, 489 F.2d 535 (2d Cir. 1973). After *Spectrum*, securities lawyers sought the ABA's assistance in resisting the policing role implied by SEC actions against lawyers. The bar reacted with an amendment to DR 7-102(B)(1) that nearly eliminated a lawyer's duty to reveal a client's fraud in which the lawyer's services were used. *See* Junius Hoffman, *On Learning of a Corporate Client's Crime or Fraud—the Lawyer's Dilemma*, 33 BUS. LAW. 1389, 1405-07 (1978). Courts affirmed the SEC's position that a lawyer who closed a merger knowing that shareholder approval was obtained through a proxy statement containing substantial misrepresentations was guilty of aiding and abetting a securities fraud. *See* SEC v. National Student Marketing Corp., 457 F. Supp. 682 (D.D.C. 1978). The SEC's disciplinary authority over securities lawyers was also involved in *In re Carter & Johnson*, in which the SEC stated that a securities lawyer had a duty to take prompt steps to end a client's substantial and continuing failure to satisfy disclosure requirements. *See In re* Carter & Johnson, Fed. Sec. L. Rep. (CCH) ¶ 82,847 (Feb. 28, 1981); *see generally* David H. Barber, *Lawyer Duties in Securities Transactions under Rule 2(e): The* Carter *Opinions*, 1982 B.Y.U.L. REV. 513.

71. Schneyer, *supra* note 31, at 702-05.

72. The phrasing of the black letter rule is also designed to influence court decisions that otherwise might impose civil liability on a lawyer who failed to disclose. That practical problem is

The same issue has now resurfaced on a large scale in the many cases in which claimants or government officials are seeking to impose liability on lawyers who advised failing savings-and-loan associations during their reckless final efforts to rescue themselves by ever-riskier (and sometimes fraudulent) transactions.[73]

The profession's discussion of the tension between confidentiality and protection of third persons almost invariably proceeds as if other laws, which often impose conflicting obligations, do not exist.[74] For example, the crime-fraud exception to the attorney-client privilege renders information unprivileged when there is a probable cause showing that the client, with or without the lawyer's knowledge, is engaged in fraud.[75] Other substantive law imposes liability on persons, including lawyers, who knowingly assist or further another person's fraud in the issuance of securities and in other contexts.[76] These well-established legal principles trump the ethics rules when they come into conflict in a legal proceeding. A judge faced with a seeming conflict between an ethics rule that points to non-disclosure of client information and an exception to the attorney-client privilege that permits disclosure by making the information unprivileged almost always requires the lawyer to testify. .

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addressed in a comment to Model Rule 1.6, confusingly inconsistent with the rule's text, that permits a "noisy" withdrawal that may result in disclosure of client fraud. *See* Ronald D. Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Flag*, 63 OR. L. REV. 455, 482 (1984). The ABA Standing Committee on Ethics and Professional Responsibility, after struggling with the tension between the black-letter rule and the comment, has found the current rule "unworkable." 7 Laws. Man. on Prof. Conduct (ABA/BNA) 173 (June 19, 1991). In prohibiting disclosure in situations in which lawyers may be subject to civil and criminal liability for non-disclosure, the rule is "unjust" and "inconsistent" with other law. *Id.* At the 1991 mid-year ABA meeting, the Committee asked the ABA House of Delegates to approve an amendment of the rule along the lines initially proposed by the Kutak Commission, but the proposal was defeated. *Id.* at 258-59 (Aug. 28, 1991).

73. *See* Stuart Taylor, Jr., *Did Jones, Day's Slick Deals Cross the Line?*, AM. LAW., Mar. 1991, at 66; Sherry R. Sontag, *Soured Deals Snag More Professionals*, NAT'L L.J., Feb. 4, 1991, at 1, 31; Steve France, *Savings & Loan Lawyers*, 91 A.B.A.J. 52 (May 1991).

74. One commentator interprets the bar's seeming blindness toward the state's positive law as a conscious attempt to influence how that law is applied to lawyers. *Cf.* Nancy J. Moore, *Limits to Attorney-Client Confidentially: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics*, 36 CASE W. RES. L. REV. 177, 184 n.36 & 230 n.249 (1985-86) (citing ABA and AMA's narrowing of ethics provisions to limit disclosure of client confidences in face of judicial decision that psychiatrist had a *legal duty* to disclose).

75. The classic statement is that of Justice Cardozo: "The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law." Clark v. United States, 289 U.S. 1, 15 (1936).

76. *See supra* note 70.

Similarly, substantive legal rules that impose civil liability on lawyers for aiding or assisting client fraud override the lawyer's reliance on an ethics rule or opinion permitting or mandating confidentiality. Ethics rules occasionally recognize this reality: the Model Code includes an exception to the confidentiality rule that permits disclosure when "required by law or court order."[77] The Model Rules, however, delete this concession from the rule itself and state a more limited concession in the comment, applicable only to the attorney-client privilege.[78] Although the Model Rules state that a conflict between a lawyer's duty of confidentiality and another rule of law permitting or requiring disclosure should be resolved in favor of confidentiality, this claim has no basis in legal authority.[79]

D. The Threat to Federal Uniformity from the Growing Balkanization of State Ethics Rules

The actual or potential conflict between state ethics rules and federal law requires consideration of the policies underlying both legal re-

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77. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(2) (1969).

78. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. ¶ 19 (1983) ("lawyer must comply with the final orders of a court or other tribunal requiring the lawyer to give [unprivileged] information about the client"). The scope note to the Model Rules also states that "these Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege." *Id.* at scope note.

79. Model Rule commentary states:

> In addition to these provisions [Rules 2.2, 2.3, 3.3, and 4.1, which permit or require a lawyer to disclose client information], a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such supersession.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. ¶ 20 (1983). The statement itself is inconsistent with language in the scope note stating that "[t]he Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general;" and that the rules "are not intended to govern or affect judicial application of either the attorney-client or work product privilege." *Id.* at scope note. For authorities holding that other substantive and procedural requirements generally trump ethics rules, see Koniak, *supra* note 17 (manuscript at notes 84-97); *but cf.* People v. Belge, 372 N.Y.S.2d 798, *aff'd*, 376 N.Y.S.2d 771 (1975) (lawyer who received confidential information from a client concerning location of the dead bodies of victims of an earlier crime did not violate a health statute requiring the reporting of a death; the attorney-client privilege shielded the lawyer from actions that otherwise would have violated the health law). The attorney-client privilege has a core content founded on the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel. Legislative efforts to invade that core, such as by requiring a lawyer to reveal information at the heart of the privilege, would violate these constitutional protections (e.g., confidential information given by an accused person in seeking a lawyer's advice concerning a past crime).

gimes and a balancing of their strength in particular contexts. Considerations involving the uniform enforcement of federal law should bulk large in such an inquiry. When federal law enforcement officials are engaged in gathering information concerning the filing of false claims, income tax violations, environmental regulations, or drug conspiracies, they should not be saddled with a haphazard array of limitations that involve incoherent balkanization of federal law. In general, the substantive and procedural rights of persons subject to federal law should not vary by state or by federal judicial district.[80] At the very least, any deference accorded to state law or to local federal district court rules should serve important public purposes and not merely random choices of federal judges in choosing the ethics rule adopted by reference in local court rules. The threat to the uniformity of federal law posed by differing ethics rules, or varying interpretations of them, is discussed in subsequent portions of this article.

E. The Relevance of These Considerations

Parts III and IV of this article demonstrate that the anti-contact rule and the subpoena rule collide with other legally recognized interests. When these collisions reach a court, it must determine what effect to give the rules—whether to enforce a subpoena, for example, or whether to exclude evidence obtained from an "unethical" contact. The special characteristics of ethics rules discussed in the preceding sections show that conflicts between ethics rules and other law raise issues that are not narrow or technical issues of judicial process for which courts have special competence and responsibility. Larger issues of substantive justice are involved: the effective, efficient, and uniform enforcement of regulatory and criminal statutes, and the constitutional allocation of lawmaking authority.

The exclusion of state legislatures from state policy-making on

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80. *See* Rand v. Monsanto Co., 926 F.2d 596, 600 (7th Cir. 1991) (criticizing the balkanization of litigation caused by federal courts that "slavishly follow[] the different state [ethics] rules"); *cf.* Committee on Rules of Prac. and Proc., Jud. Conf. of the United States, Report of the Local Rules Project on Attorneys (Nov. 1987) (collecting disciplinary rules of the ninety-four federal districts and noting extreme variations in length and substance and describing efforts to promote uniformity). *See generally* James J. Duane, *Local Rules in Ambush*, 17 LITIG. 33, 33-34 (Spring 1991) (criticizing proliferation of various local rules in federal courts as "traps for the unwary"); Committee on Rules of Prac. and Proc., Jud. Conf. of the United States, Report of the Local Rules Project: Local Rules on Civil Practice (Apr. 1989) (collecting more than 5,000 federal local rules, noting numerous inconsistencies with federal law and other problems of disuniformity).

these matters, combined with the privileged position of bar associations and the tendency of lawyers to think of themselves as immune from general legal requirements, create a potential that lawyers' self-interest will have too powerful an influence on the initial formulation of ethics rules. The past history of the use of ethics rules to stifle competition within the legal profession and with outsiders raises the issue starkly.[81] It is not obvious that shielding the profession from economic competition has any direct relationship to matters of judicial process that might be thought to fall within the special competence and authority of the courts. Yet in the economic arena, state courts were not responsive to these issues and concerns until decisions of the U.S. Supreme Court on constitutional or antitrust grounds forced change.[82]

There is strong evidence that lawyers when they regulate themselves are inclined to take positions that favor the use of lawyers and enhance their authority and prestige.[83] This is a natural and inevitable tendency of all groups. Judges, when they exercise rule-making or decisional authority in considering rules in which the bar has had a special

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81. *See, e.g.*, Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV L REV 702 (1977) (charging that ethics rules, especially those concerned with pocketbook matters such as fees, advertising, and group legal services, serve the economic interests of lawyers and not client and public interests).

82. The perception that ethics rules on economic matters did not serve public interests undoubtedly influenced the federalization of some of these matters by Supreme Court decisions. The Court rejected the bar's efforts to prevent and then to limit group legal services, *see, e.g.*, United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971) (First Amendment rights of free association violated by state's rule prohibiting union lawyers from giving legal advice to union members concerning FELA claims); struck down the bar's minimum fee schedules on antitrust grounds, *see* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); and displaced the ethics rules prohibiting virtually all lawyer advertising, *see, e.g.*, Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (First Amendment violated by rule prohibiting newspaper advertising of the price of routine legal services); Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988) (First Amendment protects personalized direct-mail solicitation of legal business).

83. *See, e.g.*, RICHARD L. ABEL, AMERICAN LAWYERS (1990) (arguing that the "professional project" of the bar has been to control the supply of lawyers and stimulate demand in order to increase the power, earnings, and prestige of lawyers); JETHRO K. LIEBERMAN, CRISIS AT THE BAR LAWYERS' UNETHICAL ETHICS AND WHAT TO DO ABOUT IT 216-17 (1978) (recommending that ethics rules be drafted by a neutral body, such as the Judicial Conference of the United States, because the ABA could never overcome the "conflict of interest inherent in balancing self-interest against public and client interest"); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 692 (1981) (arguing that ethics codes "consistently resolved conflicts between professional and societal objectives in favor of those doing the resolving"). Although the proposition that groups *invariably* act in their own self-interest is doubtful, it must be recognized that professional perspectives are shaped by an ordering of values that may differ from the priorities of broader and more representative bodies. The legal profession is public-spirited, but its view of what is in the public interest is shaped by its vision of the role and function of lawyers, which may in turn be influenced by self-interested considerations.

influence, should bear this tendency in mind. A proposed ethics rule may concern an issue that the Constitution or a statute has allocated to a coordinate branch of government, either the legislature or the executive or both. If the court decides the matter is within its rule-making or decisional authority, it should balance the systemic issues involving legal representation (and hence the interests of lawyers) against other relevant policies and law. To the extent "other law" does or may conflict with an ethics rule, that other law should affect the content or existence of the ethics rule or influence its interpretation. In general, ethics rules should be interpreted in a manner congruent with other applicable law. Where the policies that infuse a particular rule seem to weigh the interests of lawyers too heavily and those of clients, law enforcement officials, and the public too lightly—as we will argue is the case with the anti-contact and subpoena rules—these factors should be considered in interpreting the rules in a disciplinary context and applying them in other contexts.

In the matters discussed in this article the concern is that the drafting and interpretation of ethics rules may be too influenced by the legal profession's self-interest. Rules that require the use of lawyers, deprive clients of the capacity to make decisions for themselves, and put lawyers in a position to manage and control information available to governmental bodies may not serve the interests of clients and the general public. Their interplay with other elements of the legal system should be analyzed with these dangers in mind.

III. THE ANTI-CONTACT RULE

A. The Emerging Controversy

The anti-contact rule is a longstanding and widely adopted ethics rule that prohibits a lawyer from communicating with a represented party directly or through others.[84] The rule became a thorn in the side of law enforcement officials as courts first applied it to prosecutors and then extended its application to investigators and even to informants and prospective witnesses.[85] The scope and complexity of modern crimi-

84. For the rule's text, see *supra* note 3. Despite the broad acceptance of the rule, many lawyers seem to be unaware of it. For example, clinical professors in the Cornell Legal Aid Clinic report that the indigent clients whom the Clinic represents are contacted quite frequently by lawyers for the opposing side. Violations are especially common in transactional settings not involving litigation.

85. *E.g.*, United States v. Pinto, 850 F.2d 927 (2d Cir.) (potential defense witness), *cert. denied*, 488 U.S. 867 (1988); United States v. Thomas, 474 F.2d 110 (10th Cir.) (FBI agents),

nal investigations—particularly those concerning narcotics trafficking, organized crime, and white collar crimes—increasingly result in the prosecutor's involvement during the investigatory phase of criminal proceedings.[86] Such involvement increases the likelihood of contact with represented defendants, especially in cases where underlings cooperate with authorities to convict major targets in exchange for leniency.[87]

Controversy regarding the anti-contact rule intensified when former Attorney General Richard Thornburgh issued an internal memorandum purporting to exempt all Department of Justice lawyers from compliance with the rule.[88] Although the Department asserted this position since 1980,[89] its adoption as official policy followed a ruling by

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cert. denied, 412 U.S. 932 (1973); United States v. Massiah, 307 F.2d 62 (2d Cir. 1962) (informants), *rev'd on other grounds*, 377 U.S. 201 (1964). Former Attorney General Thornburgh stated that

> the Department's practice and policy coexisted peacefully with [the anti-contact rule] for years until it became a defense tactic to threaten disciplinary action against a federal prosecutor for using confidential informants, seeking wiretap authorizations, or interviewing low-level functionaries to obtain evidence against principals. . . . [I]t is worth remembering . . . the original comments on the Model Rules included language to the effect that its prohibition against contacts with represented persons was not intended to relate to certain established law enforcement techniques, like the use of confidential informants or electronic surveillance.

Richard Thornburgh, *Ethics and the Attorney General: The Attorney General Responds*, 74 JUDICATURE 290 (1991). Thornburgh states that the problem arose because of "the unwarranted expansion of the interpretation of the Model Rule's prohibition" of contact with represented parties. *Id.* at 290. The Department of Justice argues that, correctly interpreted, the anti-contact rule does not interfere with legitimate law enforcement activity. *Id.*

86. *See* Jerry E. Norton, *Government Attorneys' Ethics in Transition*, 72 JUDICATURE 299, 301 (1989).

87. *See* Letter from Kevin R. Jones, Office of Legal Policy, to Robert E. Jordan III, Chairman, Special Committee on Model Rules of the District of Columbia Bar 6-7 (Jan. 25, 1984) [hereinafter Jones Letter] (Department of Justice comments on Model Rules, describing problems of anti-contact rule).

88. Tom Watson, *AG Decrees Prosecutors May Bypass Counsel*, LEGAL TIMES, Sept. 25, 1989, at 1. The Attorney General's policy statement is discussed in Thornburgh, *supra* note 85 and Jerry E. Norton, *Ethics and the Attorney General*, 74 JUDICATURE 203 (1991).

89. Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations, 4 Op. Off. Legal Counsel 576, 577 (1980). The Department's assertion that the Department is the authoritative interpreter of the rule as applied to its attorneys, including the "authorized by law" provision, outraged bar officials, who interpreted it as a claim that federal government lawyers were not subject to ordinary rules of legal ethics in effect where they worked. *See infra* notes 97-102. Although the Department acknowledged "concern for fairness and the appearance of justice," 4 Op. Off. Legal Counsel at 583 n.15, and stated that it is "sensitive to the interests that are sought to be protected by [the anti-contact rule]," Internal Memorandum from Att'y General Dick Thornburgh to all Justice Department Litigators (June 8, 1989), the bar ignored these concessions.

the Second Circuit Court of Appeals in *United States v. Hammad*[90] that "sent shock waves" through the Justice Department.[91] The *Hammad* case involved an assistant U.S. attorney who accepted the assistance of an undercover informant during an arson investigation. The arson suspect was represented by counsel in a medicare fraud case that was connected to the arson incident. The court held that the informant's contact with the represented suspect, at the prosecutor's direction, violated the anti-contact rule.[92] Although the court of appeals reversed the decision to suppress the evidence in that case, it rejected the department's arguments regarding the scope and effect of the ethics rule.[93]

Relying on the general authority of 28 U.S.C. § 533,[94] Attorney General Thornburgh authorized Department of Justice lawyers and others working at their direction "to contact or communicate with any individual in the course of an investigation or prosecution" unless the Constitution or federal law specifically prohibits such contact.[95] Thornburgh also asserted that the Supremacy Clause protects federal prose-

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90. 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 111 S. Ct. 192 (1990).

91. Watson, *supra* note 88, at 29.

92. 858 F.2d at 838. Concerned about hindering criminal investigations, the court revised its original opinion and substantially limited its ruling. *Id.* at 839; *cf.* United States v. Hammad, 846 F.2d 854 (2d Cir. 1988) (withdrawn).

93. The revised opinion states a number of broad propositions: (1) the anti-contact rule applies to criminal investigations at the pre-indictment stage (i.e., target of a criminal investigation is a "party" to a "matter"); (2) the anti-contact rule is not subject to the same limitations applicable to communications of law enforcement personnel with an unrepresented person charged with crime; (3) the exclusionary rule is available to enforce violations of the anti-contact rule; and (4) the district court has broad discretion to determine whether suppression is appropriate. *Id.* at 838-42. The sweep of these statements, however, is markedly reduced by the actual holdings: (1) direct contacts by criminal investigators and informants with a represented suspect prior to indictment generally are "authorized by law" and therefore do not violate the anti-contact rule, even when the prosecutor is supervising the investigation and an informant is used; (2) the anti-contact rule was violated in this case only because the issuance of a false subpoena to the informant made the informant the alter ego of the prosecutor; and (3) the district court abused its discretion in suppressing videotapes of a meeting between the informant and the represented suspect. *Id.* at 839-40.

94. 6 Laws. Man. on Prof. Conduct (ABA/BNA) 25, 27 (Feb. 28, 1990). That section states:

> The Attorney General may appoint officials . . .
>
> (1) to detect and prosecute crimes against the United States; . . .
>
> (3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.

28 U.S.C. § 533 (1988).

95. Watson, *supra* note 88, at 29.

cutors from any disciplinary action states might pursue.[96] In effect, the Department of Justice threw down the gauntlet.

The defense bar raised immediate objections to Thornburgh's memorandum. Neal Sonnett, president of the National Association of Criminal Defense Lawyers, described it as "a green light to ignore the Code of Professional Responsibility."[97] Sonnett feared that the memo would encourage abuse of the Sixth Amendment right to counsel.[98] The ABA also responded angrily to the Attorney General's attempt to circumvent the anti-contact rule. In its 1990 mid-year meeting, the ABA House of Delegates overwhelmingly approved a resolution "oppos[ing] any attempt by the Department of Justice unilaterally to exempt its lawyers from the professional conduct rules that apply to all lawyers under applicable rules of the jurisdictions in which they practice."[99] One ABA delegate stated that Thornburgh's position amounted to "sheer governmental arrogance."[100]

The bar, with the ABA the most active participant, asserts that federal lawyers are subject to the disciplinary rules of the states in which they are admitted or are practicing.[101] The bar argues that

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96. *Id.*

97. *Id.*

98. *Id.*

99. 6 Laws. Man. on Prof. Conduct (ABA/BNA) 25, 27 (Feb. 28, 1990). The full text of the resolution states:

> That it is the policy of the American Bar Association
>
> a. that Department of Justice lawyers may not be given blanket exemption from the requirements of Rule 4.2 of the ABA Model Rules of Professional Conduct or Disciplinary Rule 7-104(A)(1) of the predecessor ABA Model Code of Professional Responsibility as adopted in individual jurisdictions; and
>
> b. to oppose any attempt by the Department of Justice unilaterally to exempt its lawyers from the professional conduct rules that apply to all lawyers under applicable rules of the jurisdictions in which they practice.

Id.

100. *Id.* (statement of Marna Tucker).

101. Bar officials have steadily opposed the use by federal agencies of access to agency proceedings as a lever to enforce federal regulatory requirements by monitoring lawyer behavior. A long controversy has surrounded the efforts of federal regulatory agencies to admit and to discipline lawyers (and sometimes nonlawyers) in agency proceedings. *See* Sperry v. Florida *ex rel.* Florida Bar, 373 U.S. 379 (1963) (state control barring unauthorized practice of law inconsistent with federal statute authorizing lay persons to provide legal services "reasonably necessary and incident to the preparation and prosecution of patent applications" before the U.S. Patent Office). The most longstanding quarrel between the bar, asserting that the practice of law is or should be a field of exclusive state regulation, and a federal regulatory program involves the Securities and Exchange Commission. *See supra* note 70. For criticism of the SEC's use of its disciplinary authority, see Steven C. Krane, *The Attorney Unshackled: SEC Rule 2(e) Violates Clients' Sixth Amendment Right to Counsel*, 57 NOTRE DAME L. REV. 50 (1981); Richard L. Miller, *The Dis-*

courts, state and federal (but usually state courts, in which bar associations have the greatest influence), have exclusive authority to regulate the conduct of federal government lawyers in the absence of explicit and inconsistent federal statutory provision.[102] From the ABA's perspective, professional rules that seek to protect the lawyer-client relation, such as the anti-contact rule and the new rule restricting lawyer subpoenas, are as vital a part of judicial regulation of lawyers as those governing admission to practice. One institutional participant in litigation—the Department of Justice—may not carve out for its lawyers special rules that depart from rules applicable to lawyers generally.

The Department of Justice primarily argues that the anti-contact rule, properly interpreted, does not restrict contacts with persons, whether or not represented, against whom no charges have been filed; nor does it apply to contacts initiated by a represented defendant.[103] If these interpretive arguments fail, the department claims authority under the Supremacy Clause to override generally applicable state ethics rules when requirements of federal law so demand.[104] The department asserts that the Supremacy Clause precludes a state from disciplining a federal employee acting within the scope of his or her duties. Supporting policy arguments are that uniform standards must govern

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tortion and Misuse of Rule 2(e), 7 SEC. REG. L.J. 54 (1979); Note, *SEC Disciplinary Proceedings Against Attorneys Under Rule 2(e)*, 79 MICH. L. REV. 1270 (1981).

102. A report to the ABA House of Delegates argued:

> [I]n the absence of an express congressional prohibition on the regulation of investigative conduct by U.S. Attorneys or some evidence of a congressional intent to preempt the field, the Supremacy Clause does not invalidate [state ethics rules]. There is a presumption against preemption '[w]here . . . the field that Congress is said to have pre-empted has been traditionally occupied by the States.' Regulation of the conduct of attorneys is precisely such a field.

Lit. Sect. & Comm. on Prof. Discipline, A.B.A., Report to the House of Delegates (undated report prepared for February 1990 meeting), *reprinted in* LEGAL ETHICS 1990, at 470, 474-75 (Jonathan J. Lerner & Robert J. Jossen eds., Practising Law Institute 1990). In another context, the ABA Section of Corporation, Banking and Business Law challenged the SEC's authority to discipline lawyers. *See SEC Standard of Conduct for Lawyers: Comments on the SEC Rule Proposal*, 37 BUS. LAW. 915 (1982).

103. The extent of reliance upon the Supremacy Clause in the original Thornburgh memorandum led some commentators and courts to ignore the Department's interpretive arguments. Former Attorney General Thornburgh attempted to rectify this misunderstanding. *See* Thornburgh, *supra* note 85.

104. The Thornburgh memorandum stated that "the Supremacy Clause will continue to provide Department attorneys and agents with adequate assurances that the United States will support them if any disciplinary authority other than the United States attempts to interfere with the legitimate investigative prerogatives of the government." Watson, *supra* note 88, at 29. Subsequently, Thornburgh explained that "the Supremacy Clause is not the principal or the only arrow in our quiver." Thornburgh, *supra* note 85, at 291.

federal government lawyers who practice nationwide;[105] and that local disciplinary authority is unnecessary with respect to federal government lawyers, who are constrained by the relevant constitutional decisions and are subject to supervisory control by their employing agencies.[106]

The department's uniformity argument does embody a highly relevant federal concern in an era in which ethics rules are becoming balkanized. Thirty-five states have adopted various versions of the Model Rules of Professional Conduct; most of the remaining states have versions of the Model Code of Professional Responsibility.[107] State-by-state differences in the duties imposed on lawyers are rapidly multiplying.[108] In this context there is a strong argument for the application of

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105. The Department contends that "because the Government employs attorneys who are members of the bars of all fifty states and the District of Columbia, it would be impossible to conform the conduct of the Department to comply with the rules of each of those jurisdictions." Letter from D. Lowell Jensen, Deputy Att'y General, to Robert E. Jordan III, Chairman, Model Rules of Professional Conduct Committee of the District of Columbia Bar 4 (May 23, 1986) [hereinafter Jensen Letter]. Of course, this argument also implies that United States attorneys need not conform their conduct to the varying local ethics rules of the federal district courts in which they appear.

106. "The Department and other Government agencies hold their employees, including attorneys, to the highest standards of ethical conduct, and additional regulation by a local bar is unnecessary and misplaced." *Id.* Justice Department regulations state that its lawyers "should be guided" by the ABA Code of Professional Responsibility. 28 C.F.R. § 45.735-1 (1990). This choice of language is deliberate, replacing the statement that its lawyers "are subject to" the Canons of Professional Ethics. 46 Fed. Reg. 53,358 (1981). The reference to the Model Code is now somewhat anachronistic since the majority of states and the District of Columbia have adopted versions of the Model Rules of Professional Conduct. The Federal Bar Association is in the process of preparing an ethics code for federal government lawyers. *See infra* note 208.

107. See Laws. Man. on Prof. Conduct (ABA/BNA) § 01:3 for a list of states revising their ethics rules since 1983. In a number of these Model Rule jurisdictions, such as the District of Columbia, Illinois, and Texas, major changes were made in the text of many rules. *Id.* at § 01:35 (District of Columbia); § 01:33 (Illinois); § 01:30 (Texas) (text summarizing departures from the Model Rules in these states' new rules). Most of the remaining states have lawyer codes based on the Model Code of Professional Responsibility, but many of these states have reconsidered and revised many rules in light of the Model Rules provisions. *See, e.g., id.* at § 01:38 (New York); § 01:11 (Virginia). A few states, including California, have adopted ethics codes that are not based on either model. The professional rules of California, the District of Columbia, and New York are reprinted, along with the Model Rules and the Model Code, in THOMAS D. MORGAN & RONALD D ROTUNDA, 1992 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (1992).

108. The result is that there are a growing number of differences on major matters in the various states. Differences in rules relating to lawyer confidentiality, for example, are abundant. For a detailed discussion of state departures from the text of the Model Rules as adopted by the ABA, see STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS—STATUTES AND STANDARDS 1992 (1992). With respect to disclosure of client fraud, prohibited by the text of Model Rule 1.6, most states have departed from the ABA formulation. *E.g.*, New Jersey (requiring a lawyer to reveal confidential information to prevent future fraud); Pennsylvania (permitting

uniform rules, at least as to some matters, to lawyers employed by the United States to vindicate federal law, who carry out investigations that cross state lines.[109]

The proper scope and interpretation of the anti-contact rule, and the legal efficacy of the Thornburgh Memorandum, remain unresolved. As the following sections illustrate, existing case law is far from uniform. Until the Supreme Court chooses to address the issues, however, lower courts are likely to face an increasing number of legal challenges to prosecutorial contacts with defendants, co-defendants, and even witnesses.[110] When these challenges arise, courts should examine not only the background considerations discussed previously, but also a host of other issues specific to the anti-contact rule that are explored below.

B. History and Purpose of the Anti-Contact Rule

The anti-contact rule first appeared in 1908 as Canon 9 of the ABA Canons of Professional Ethics, prior to which it existed in looser form as a professional courtesy.[111] Its rationale, insofar as one is expressed in the ABA Code of Professional Responsibility, is that "[t]he legal system in its broadest sense functions best when persons in need

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but not requiring disclosure); and Delaware (prohibiting disclosure and making no exception to the lawyer's duty of confidentiality for future client fraud). *Id.* at 54-56. For a tabular presentation of the differences on lawyer revelation of client fraud, see HAZARD & KONIAK, *supra* note 30, at 292. *See also* Committee on Rules of Prac. and Proc., Jud. Conf. of the United States, Report of the Local Rules Project on Attorneys (Nov. 1987) (comparing disparate approaches to bar admission and discipline among the federal districts).

109. Controversy surrounding the anti-contact rule prompted congressional hearings on the matter of Justice Department authority. *See Prosecutorial Authority: Hearings Before the Subcommittee on Government Information, Justice, and Agriculture of the House Committee on Government Operations,* 101st Cong., 2d Sess. (1990); FEDERAL PROSECUTORIAL AUTHORITY IN A CHANGING LEGAL ENVIRONMENT: MORE ATTENTION REQUIRED, H.R. REP. NO. 986, 101st Cong., 2d Sess. 31 (1990). The hearings produced no conclusive action. The House Subcommittee urged the Attorney General to rescind the memorandum exempting litigators from some applications of the anti-contact rule, and to gather information on the rule's interference with the Department's law enforcement efforts. *Id.* at 33. The Subcommittee left to the courts the final decision on the strength of federal executive authority vis-a-vis state bar and federal court authority. *Id.* at 32.

110. United States v. Pinto, 850 F.2d 927, 934-35 (2d Cir.), *cert. denied*, 488 U.S. 867 (1988).

111. Leubsdorf, *supra* note 3, at 684-85. Leubsdorf's careful analysis concludes that the communication rule has too broad a sweep. He argues that a lawyer should be able to communicate in writing with a represented party, provided that that person's lawyer is simultaneously sent a copy. In addition, the rule should be modified to permit direct communication after informing the person's lawyer of the intended communication. *Id.* at 704.

of legal advice or assistance are represented by their own counsel."[112] Most courts explain the anti-contact rule in terms of protecting the lawyer-client relationship from harmful interference by an opposing party's lawyer, in both the client's and the lawyer's interests, or serving an important societal interest in not having unrepresented lay persons make decisions of legal consequence.[113]

One commentator offers several reasons for the rule: protecting clients from disclosing privileged information, channelling negotiations through disinterested parties, avoiding the potential for forcing a lawyer to become a witness, and generally guarding against overreaching.[114] While these are legitimate concerns, the anti-contact rule can also serve the interests of lawyers by giving them control over the flow of information to their clients and others.

In the civil context, the anti-contact rule is perhaps the only barrier against possible abuses by the opposing lawyer that may harm the client's interests or interfere with the lawyer-client relationship. In the criminal context, however, the Sixth Amendment provides similar safeguards. The Washington Supreme Court recognized this in *State v. Nicholson*: "[T]he purpose of [the anti-contact rule] was to assure civil litigants some of the protection from [oppression, intimidation and unfair advantage] which the federal and state constitutions guarantee to criminal defendants."[115] That court decided that the anti-contact rule does not apply in criminal proceedings.

> [S]uch a restriction [upon the investigative powers of law enforcement officers] was not contemplated by those who framed the Canons of Professional Ethics, who must have been aware of the practice of taking confessions of persons under arrest. If such a commonly accepted practice were thought to be unethical conduct per se, it would seem that express words would have been used to forbid it.[116]

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112. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-18 (1969).

113. United States v. Batchelor, 484 F. Supp. 812, 813 (E.D. Pa. 1980).

114. Leubsdorf, *supra* note 3, at 686-87 (citing Lewis Kurlantzick, *The Prohibition on Communication with an Adverse Party*, 51 CONN. B.J. 136, 145-46 (1977)).

115. State v. Nicholson, 463 P.2d 633, 636 (Wash. 1969). *See also* State v. Richmond, 560 P.2d 41, 46 (Ariz. 1976) (anti-contact rule does not apply to prosecutors); Stringer v. State, 372 So. 2d 378, 382 (Ala. Crim. App. 1979). *Nicholson* was decided during an era when the constitutional protections provided to criminal defendants were expanding rapidly. More recently the trend of Supreme Court decisions has been in the reverse direction, and some lower federal courts and state courts have searched for grounds other than federal constitutional ones to provide additional protections for criminal defendants from what is perceived as governmental abuse. The anti-contact rule provides the basis for a colorable claim of an expanded obligation.

116. 463 P.2d at 636. The Justice Department's Office of Legal Counsel has also argued that the anti-contact rule was formulated for civil cases and should not have general application to

Legal scholars have also stated flatly that the anti-contact rule was not intended to apply to the investigatory activities of law enforcement officials.[117] Professor Uviller, for example, argues that the anti-contact rule was designed for civil litigation, in which adversarial ethics find a comfortable place.[118] The rule is inappropriately applied to the criminal justice field which, in practice, departs from the adversarial model in important respects: discovery is limited or non-existent, special institutions such as the grand jury operate, and the prosecutor's role differs from that of a traditional advocate.

The availability of discovery in civil litigation provides opportunities for access to information in the opposing party's possession or control. But in the criminal context, where discovery is unavailable and an accused has a constitutional right not to cooperate, the anti-contact rule applies only to the prosecutor, thus undermining the symmetry of the adversarial process.[119] Moreover the prosecutor, unlike the civil advocate, has "[t]he paramount professional obligation . . . to promote a just outcome, not a partisan victory."[120] Because the prosecutor's client is the public, in theory, "talking to the suspect or defendant is talking to one of [the prosecutor's] own clients and obeying the overriding imperative to seek all the facts to enhance the likelihood of a correct verdict."[121] Uviller concludes that communications between a prosecutor

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criminal cases. *See* 4 Op. Off. Legal Counsel 576, 584 (1980).

117. L. RAY PATTERSON & THOMAS B. METZLOFF, LEGAL ETHICS. THE LAW OF PROFESSIONAL RESPONSIBILITY 709 (3d ed. 1989) ("Almost surely drafters of the Rule [the anti-contact rule—DR 7-104(A)(1)] did not contemplate its application to prosecutors."); Bruce A. Green, *A Prosecutor's Communications with Defendants: What Are the Limits?*, 24 CRIM L BULL 283 (1988) (same); H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L REV. 1137, 1176-83 (1987) (anti-contact rule was not designed with prosecutors in mind).

118. Uviller, *supra* note 117, at 1179-83.

119. *See* Green, *supra* note 117, at 318-20 (arguing that the prosecutor's duty to seek information through investigatory techniques and the societal interest in law enforcement, coupled with absence of discovery and the self-incrimination rights of an accused, justify differentiating criminal from civil proceedings. The anti-contact rule "upsets the relative balance of advantage between prosecutors and criminal defendants that the law otherwise establishes.").

120. Uviller, *supra* note 117, at 1179-80; *see* United States v. Butler, 567 F.2d 885, 894 (9th Cir. 1978) (Ely, J., concurring) (role of federal prosecutors includes "duty to protect the interests of all people, including, of course, the legitimate rights of those accused of crime"). One may argue that this role suggests prosecutors should be held to the same standards as private attorneys, if not higher ones. But the duties of private lawyers and prosecutors cannot be so compared. They are simply *different* in important respects, e.g. disclosure of favorable evidence and other aspects of confidentiality. We argue that direct communications is one of those areas of difference.

121. Uviller, *supra* note 117, at 1180; *see also infra* notes 171-72 and accompanying text.

and a suspect or defendant should be judged by the special right-to-counsel law developed specifically for this issue, not "principles of mutual professional comity."[122]

Contrary to the approach in *Nicholson*, a large majority of decisions hold that the anti-contact rule generally applies to prosecutors.[123] Even some who oppose the existing anti-contact rule and advocate limiting or modifying it—including the Department of Justice—recognize that its rationale extends to criminal cases, with more justification for its protective function in that context than in others. Not only are criminal interrogations more formidable and the potential consequences of a criminal action more severe than in civil litigation, but the criminal client seems more likely to be unsophisticated.[124] The Department of Justice acknowledges that the risk of damaging admissions, waiver of privileges, and misstatements "clearly applies in criminal proceedings, perhaps with more force than in the civil context."[125]

Many of the decided cases, however, treat the rule's protections as overlapping the constitutional protections applicable to criminal defendants. In fact, in the reported cases alleged violations of Fifth and Sixth Amendment rights accompany most alleged violations of the anti-contact rule and dominate the discussion. As a result of the overlap between conduct proscribed by the Sixth Amendment and conduct proscribed by the anti-contact rule, few courts have analyzed the rule's applicability *per se* to the prosecutorial conduct at issue. Instead, courts often preface comments regarding asserted ethics violations with an assumption that the rule applies.[126] If the prosecutor's conduct meets

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122. *Id.* at 1182.

123. *E.g.*, United States v. Hammad, 858 F.2d 834, 837-38 (2d Cir. 1988) (stating that rule's applicability to criminal prosecutions is conclusively established), *cert. denied*, 111 S. Ct. 192 (1990). *Hammad* does not consider the state cases holding the anti-contact rule inapplicable to a criminal matter, *see supra* notes 115-16 and accompanying text; nor does it reflect the ambiguity and uncertainty of prior second circuit decisions, *e.g.*, United States v. Vasquez, 675 F.2d 16 (2d Cir. 1982) ("[e]ven assuming this provision of the Code to be applicable to a criminal investigation, *which is doubtful*, it was not intended to [hamper the government's conduct of legitimate investigations].") (emphasis added). *See generally* Gregory G. Sarno, Annotation, *Communication with Party Represented by Counsel as Ground for Disciplining Attorney*, 26 A.L.R.4th 102 (1983).

124. Leubsdorf, *supra* note 3, at 702.

125. 4 Op. Off. Legal Counsel 576, 584 (1980).

126. *See* United States v. Dobbs, 711 F.2d 84, 86 (8th Cir. 1983); United States v. Massiah, 307 F.2d 62, 66 (2d Cir. 1962), *rev'd on other grounds*, 377 U.S. 201 (1964); *cf.* United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982) (per curiam) (assuming anti-contact rule applies to criminal investigations); United States v. Crook, 502 F.2d 1378, 1380 (3d Cir. 1974) (assuming anti-contact rule applies to FBI agents), *cert. denied*, 419 U.S. 1123 (1975). Many of

Sixth Amendment standards, there is a strong tendency in the decisions to reject a claim that the ethics rule has been violated.[127] Because discussion of the two matters is so intertwined, and often so confused, a brief explanation of the implicated constitutional protections is necessary.

C. *The Right to Effective Assistance of Counsel*

The Sixth Amendment guarantees a criminal defendant the right to counsel once adversarial judicial proceedings have commenced against him.[128] A similar right to counsel, deriving from the Fifth Amendment privilege against compulsory self-incrimination arises during custodial interrogation, regardless of the existence of adversarial proceedings.[129] Once the right to counsel has attached or has been invoked, law enforcement officials may not interrogate the defendant further,[130] deliberately elicit incriminating information from a defendant,[131] intentionally create a situation likely to induce a defendant to make incriminating statements,[132] nor attempt to induce a defendant to

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these decisions antedate the maturing of the constitutional limits during the 1980s and should be reconsidered in light of these subsequent developments.

127. *E.g.*, United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir.) (non-custodial pre-indictment contact does not implicate ethical rule), *cert. denied*, 452 U.S. 920 (1981).

128. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. A "criminal prosecution" exists upon the initiation of adversary judicial proceedings against the accused. Michigan v. Jackson, 475 U.S. 625 (1986); Brewer v. Williams, 430 U.S. 387 (1977).

129. Miranda v. Arizona, 384 U.S. 436 (1966) (holding that police must terminate interrogation of an accused in custody if the accused requests the assistance of counsel). The Fifth Amendment right to counsel, designed to protect the accused's privilege against self-incrimination, was reaffirmed, 6-2, in *Minnick v. Mississippi*. Minnick v. Mississippi, 111 S. Ct. 486 (1990) (conviction resting on statements obtained in re-initiation of interviews of an accused in custody, after accused had requested and been provided counsel, who was not present, violated the Fifth Amendment).

130. *Michigan v. Jackson* established the "prophylactic rule" that a waiver of the Sixth Amendment right to counsel after it is applicable and invoked is presumed invalid, with the result that the evidence flowing from it may not be used as substantive evidence against the defendant in the prosecution's case-in-chief. Michigan v. Jackson, 475 U.S. 625 (1986). When a defendant in custody requests counsel, interrogation must cease. *Minnick*, 111 S. Ct. at 491. If interrogation continues in violation of the prophylactic rule, however, resulting evidence may be used to impeach the defendant's testimony, Michigan v. Harvey, 494 U.S. 344 (1990), or to establish other crimes, Maine v. Moulton, 474 U.S. 159 (1985).

131. Brewer v. Williams, 430 U.S. 387 (1977) (statements made to police absent direct questioning but in response to deliberate attempt to elicit information violated right to counsel).

132. United States v. Henry, 447 U.S. 264 (1980) (statements made to cellmate informant who actively induced conversations violated right to counsel).

waive his right to counsel.[133] Nor may they interfere with the lawyer-client relationship in such a way as to render counsel's assistance ineffective.[134]

The restrictions thus imposed, however, leave prosecutors and other law enforcement personnel considerable investigative leeway to communicate with suspects and defendants. First, the restrictions do not apply until the government initiates adversarial judicial proceedings. Typically the filing of an indictment or information, or the defendant's arraignment or initial appearance on a complaint, marks the point at which the right to counsel attaches.[135] During a general investigation, there is no constitutional bar to direct communication with one represented by counsel.[136] Narrowing an investigation to focus upon a particular suspect does not mature the suspect's right to counsel;[137] nor does calling a suspect as a witness before a grand jury;[138] nor does detaining a suspect, even with the intent to file charges.[139] Even when sufficient evidence exists to procure an indictment, a prosecutor is under no obligation to seek one, and may thereby delay triggering the right to counsel.[140]

Second, even after the right to counsel has attached, its restrictions do not shield a defendant for all purposes.[141] Investigators are free

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133. Michigan v. Jackson, 475 U.S. 625 (1986) (waiver in response to police-initiated questioning is invalid).

134. Herring v. New York, 422 U.S. 853 (1975); *see* 2 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.3 (1984 & Supp. 1991).

135. 2 LAFAVE & ISRAEL, *supra* note 134, at 8 (Supp. 1991).

136. The actual existence of an attorney-client relationship does not alter the dimensions of the Sixth Amendment's protections. Even though a defendant has no lawyer, police may not question the defendant once his *right* to counsel attaches. McLeod v. Ohio, 381 U.S. 356 (1965) (mem.), *summarily rev'g*, 203 N.E.2d 349 (Ohio 1964). Conversely, investigators are free to question a defendant who *is* represented by counsel so long as his *right* to counsel has not attached. Moran v. Burbine, 475 U.S. 412 (1986); United States v. Kenny, 645 F.2d 1323 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981). There is no constitutional obligation to honor an attorney's request that questioning not proceed in her absence; nor is there any obligation to inform a suspect that his attorney wishes to contact him. *Moran*, 475 U.S. at 425. It should be noted, however, that the *Moran* decision concerned the derivative Fifth Amendment right to counsel; the Supreme Court has noted that the Sixth Amendment's protections extend further, Patterson v. Illinois, 487 U.S. 285, 296 n.9 (1988), so the Sixth Amendment might bar conduct that the Fifth Amendment will tolerate.

137. *See* Hoffa v. United States, 385 U.S. 293 (1966).

138. United States v. Fitterer, 710 F.2d 1328 (8th Cir. 1983).

139. United States v. Gouveia, 467 U.S. 180 (1984).

140. United States v. Craig, 573 F.2d 455 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); *but see* United States v. Dobbs, 711 F.2d 84, 85 n.1 (8th Cir. 1983) (Sixth Amendment right might arise earlier if government intentionally delays seeking indictment).

141. 1 LAFAVE & ISRAEL, *supra* note 134, at 470; Maine v. Moulton, 474 U.S. 159 (1985).

to question a defendant represented by counsel on matters unrelated to the subject matter of the proceedings in progress.[142] Third, there is no constitutional bar to simply receiving information from one whose right to counsel has attached. The Sixth Amendment is not violated when information is volunteered[143] or obtained unintentionally.[144] Fourth, the government may intrude upon the lawyer-client relationship if there are important justifications for doing so and the intrusion will not actually impair defense counsel's performance.[145] So, for example, an undercover agent may attend meetings between a defendant and his lawyer if necessary to preserve the agent's cover, so long as there is no actual prejudice to the defendant.[146] Finally, a defendant may waive his Sixth Amendment protections at any time. While a valid waiver of counsel's assistance at trial requires a thorough judicial inquiry, a suspect may waive his right to counsel during police questioning as easily as he may waive his *Miranda* rights.[147] A valid waiver does not require the presence or participation of defendant's counsel.[148]

The line drawn for Sixth Amendment purposes—the commencement of an adversarial proceeding against a person—is supported largely by considerations of administrative efficiency and policies balancing law enforcement interests against those of criminal defendants. Current decisional law treats the defendant and his lawyer as a unit;[149]

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142. 1 LAFAVE & ISRAEL, *supra* note 134, at 470. The authors suggest, however, that if proceedings are initiated for certain offenses as a pretext to facilitate the investigation of "unrelated" offenses, or if the separate offenses under investigation are closely related to those for which proceedings have commenced, the defendant's Sixth Amendment shield may extend as well to those offenses for which proceedings have *not* yet commenced. 1 *Id.*

143. Kuhlmann v. Wilson, 477 U.S. 436 (1986) (statements made to cellmate informant who passively received information did not violate right to counsel).

144. United States v. Metcalfe, 698 F.2d 877 (7th Cir.), *cert. denied*, 461 U.S. 910 (1983).

145. 2 LAFAVE & ISRAEL, *supra* note 134, at 74-76 & Supp. 29-30 nn.27.1, 28.

146. Weatherford v. Bursey, 429 U.S. 545 (1977) (no actual prejudice or Sixth Amendment violation when undercover agent attended defendant's trial strategy meetings at defendant's request, to maintain his cover, but did not disclose information to prosecutor or in his trial testimony); *see also* United States v. Mastroianni, 749 F.2d 900 (1st Cir. 1984).

147. Patterson v. Illinois, 487 U.S. 285 (1988); *cf.* Von Moltke v. Gillies, 332 U.S. 708, 722 (1948) (judge's duty to inquire into defendant's understanding of her legal rights upon waiving assistance of counsel "cannot be discharged as though it were a procedural formality").

148. Brewer v. Williams, 430 U.S. 387 (1977).

149. *See* Estelle v. Williams, 425 U.S. 501, 512 (1976) (defendant's constitutional objection to being dressed in prisoner's garb at the trial held waived because his lawyer did not object; the trial judge is not required to take affirmative action to protect the criminal defendant's constitutional rights once defendant has assistance of counsel), Coleman v. Thompson, 111 S. Ct. 2546 (1991) (defendant's constitutional claims held waived by procedural default because his lawyer was late in filing an appeal from the state court's denial of habeas relief and summary denial of

gives defense counsel broad authority to make decisions without the consent of her client;[150] and binds the client to actions taken by defense counsel.[151] This mythic unity of the defendant and defense counsel requires that a sharp distinction be drawn between the pre-indictment and post-indictment stages as a bright-line trigger for the application of protection against interrogation that violates the Fifth and Sixth Amendments. Because the prevailing model views the judge as a passive umpire, lacking a duty to take affirmative steps to achieve fair results, the prosecutor must be permitted to act when serious concerns arise about defense counsel's performance. Permitting a prosecutor to bring a conflict of interest between a defendant and defense counsel to the court's attention protects fairness to the defendant.[152] The constitutional decisions, whatever their merits, are deeply entrenched. In view of the detailed complexity of constitutional criminal procedure, it would be unwise to interpret the anti-contact rule, designed to further parallel policies, in a more expansive manner.

In several recent cases, defense counsel have urged the Supreme Court to embody the anti-contact rule in the constitutional law interpreting the Sixth Amendment. In *Patterson v. Illinois*,[153] Justice Ste-

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review followed; the court was presumed to have enforced its procedures, thus barring Federal habeas review of the merits of the claim); McCleskey v. Zant, 111 S. Ct. 1454 (1991) (defendant's habeas petition based on later discovered evidence barred because defendant's lawyer omitted Sixth Amendment claim from federal habeas petition, due to unavailability of supporting evidence at the time of petition; the "cause and prejudice" test attributes to the habeas petitioner the knowledge his lawyer should have had). One observer comments that "the system works only one way: A lawyer may default on claims on behalf of a petitioner, but a petitioner may not attack the lawyer as ineffective for having done so." Eric M. Freedman, *Habeas Corpus Cases Rewrote the Doctrine*, NAT'L L.J., Aug. 19, 1991, at S6-S7.

150. *See* Jones v. Barnes, 463 U.S. 745 (1983) (on defendant's appeal from a criminal conviction, his counsel need not argue all non-frivolous issues requested by her client).

151. *See* McCleskey v. Zant, 111 S. Ct. 1454 (1991) (federal habeas relief is unavailable in a death penalty case where defendant's lawyer failed to make a timely motion raising the prosecutor's failure to supply all relevant material to the defense).

152. *See ABA-AALS Joint Conference Report on Professional Responsibility*, 44 A.B.A.J. 1159, 1218 (1958) ("The public prosecutor cannot take as a guide . . . the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. 1 (1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.").

153. 487 U.S. 285 (1988) (holding that an indicted defendant in police custody, who had not requested counsel, validly waived his right to counsel in waiving *Miranda* rights).

vens was prepared to do so, stating that "[t]he Court should not condone unethical forms of trial preparation by prosecutors or their investigators."[154] The anti-contact rule should be applied in the criminal context, according to Justice Stevens, to prevent the prosecutor or agents of the prosecutor from conducting private interviews with an unrepresented defendant once adversarial proceedings have commenced; a defendant should not casually be permitted to waive his right to prevent such contacts.[155] The Court, however, declined to take this step both in *Patterson* and a subsequent case, *Michigan v. Harvey*.[156] On several occasions, the Court has admonished lower federal courts that used the supervisory power to avoid the carefully considered limits the Court itself had established for constitutional remedies.[157] Its rejection of the anti-contact rule as grounds for an exclusionary rule is therefore significant.

The large body of decisional law dealing with constitutional right-to-counsel issues prohibits the type of communication by a prosecutor with a criminal defendant that falls within the clear core of the anti-contact rule. Equally clearly, however, the Sixth Amendment does not prohibit communication in many situations in which counsel, or courts, may seek to apply the ethics rule to do so. As a general proposition, consideration of rights and duties should not be turned into discussions of what is constitutionally permissible. The question of what is sound policy should not be converted into discussions of constitutional minimums. In this context, however, given the detailed body of rules of constitutional criminal procedure governing the conduct of law enforce-

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154. *Id.* at 301.

155. *Id.* at 303.

156. 494 U.S. 344 (1990). Justice Stevens, in dissent, repeated his argument that the state's "shabby practice" (as he called it in *Patterson*, 487 U.S. at 302) of interrogating a represented defendant while in custody, even given an informed and voluntary waiver of the right to have counsel present, should result in exclusion of the resulting evidence for all purposes, including impeachment. *Id.* at 355, 365-66 (Stevens, J. dissenting).

157. *See* United States v. Payner, 447 U.S. 727 (1980). In *Payner* the Court stated that "[t]he values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment." *Id.* at 736. The Supreme Court had already weighed the competing values and concluded that "the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices . . . ." *Id.* at 735. Consequently, the lower court's use of supervisory power "amount[ed] to a substitution of individual judgment for the controlling decisions of this Court." *Id.* at 737; *see also* United States v. Hasting, 461 U.S. 499 (1983); *see generally* Sara S. Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV 1433, 1462 (1984).

ment personnel, it would be unwise to create a second regime based on ethics rules. This is especially the case because ethics rules rarely take into account the full range of interests that should govern the uneasy balance between effective law enforcement and a defendant's procedural and substantive rights.

D. Application of the Anti-Contact Rule to Federal Prosecutors

1. Who is a Party?

By its terms, the anti-contact rule bars communication with a party represented by counsel. When is a target, a suspect, or a defendant a party to whom the anti-contact rule applies? Arguably, in the criminal context, until "the Government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified," there is no legal matter, controversy or proceeding to which a person may be a party.[158] Accordingly, the rule would apply at the same time the Sixth Amendment right to counsel attaches.[159] Several courts have limited the anti-contact rule in this way, determining that the rule does not apply during the investigatory phase of law enforcement activity.[160] These approaches, holding the rule inapplicable prior to the attachment of the right to counsel, interpret the anti-contact rule's scope as at most co-extensive with constitutional rights.

Comments to Model Rule 4.2 expressly state that the anti-contact rule covers any *person* represented by counsel concerning the subject matter of a communication, whether or not a party to a formal proceeding.[161] Some courts and commentators find this view objectionable, in part because of the special protection it affords those who are continuously represented in any and all matters—large corporations, criminal

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158. Kirby v. Illinois, 406 U.S. 682, 689 (1972). *Kirby* relied on this rationale to conclude that initiation of criminal judicial proceedings is required before the Sixth Amendment right to counsel attaches, because only then does a person become an "accused."

159. Regardless of the commencement of proceedings, the anti-contact rule may be held to apply to custodial contacts, parallelling an interviewee's Fifth Amendment right to counsel during custodial interrogation. United States v. Killian, 639 F.2d 206, 210 (5th Cir.), *cert. denied*, 451 U.S. 1021 (1981); United States v. Durham, 475 F.2d 208, 211 (7th Cir. 1973); United States v. Thomas, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); United States v. Four Star, 428 F.2d 1406, 1407 (9th Cir.), *cert. denied*, 400 U.S. 947 (1970).

160. *See* United States v. Ryans, 903 F.2d 731, 739 (10th Cir.) (holding that communications during pre-indictment investigations do not violate anti-contact rule), *cert. denied*, 111 S. Ct. 152 (1990). Courts have reached this result primarily by viewing violation of the anti-contact rule as interference with assistance of counsel, which is constitutionally prohibited only after the Sixth Amendment right to counsel has attached. *See supra* notes 134, 145.

161. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. (1983).

enterprises with 'house' counsel, and career criminals.[162] The Supreme Court rejected a similar approach to the applicability of the Sixth Amendment's protections.[163] The text of the rule, referring to "party" rather than "person," is authoritative, however, and the comments, which many states have not formally adopted, are intended only as an aid to interpretation.[164]

The federal courts of appeal are divided on this threshold issue of who is a party. In *United States v. Ryans*,[165] the Tenth Circuit panel decided that a "party" is a litigant, and that the anti-contact rule contemplates "an adversarial relationship between litigants."[166] The panel held the rule inapplicable to investigative contacts occurring before the proceedings became accusatory. *Ryans* involved communication between an informant and an investigation target, made at an FBI agent's direction with the assistant U.S. attorney's knowledge. The informant taped conversations in a non-custodial setting two and one-half years before the target was indicted, but after the target was subpoenaed and had retained counsel in the matter. In arguing that the tapes should be suppressed, the defendant relied heavily on *United States v. Hammad*.[167] The Tenth Circuit expressly rejected *Hammad*'s interpretation of the anti-contact rule.

In *Hammad*, the Second Circuit panel declined to define the anti-contact rule's operation by the phase of the proceedings, because of the prosecutor's ability to control the initiation of adversarial proceedings.[168] *Hammad* advanced the period of the rule's operation to pre-indictment, non-custodial contacts, while stating that investigatory contacts at this stage were generally within the "authorized by law" excep-

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162. United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852 (1983); United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982); United States v. Masullo, 489 F.2d 217, 223-24 (2d Cir. 1973); Leubsdorf, *supra* note 3, at 702. Similarly broad views have been asserted by corporate counsel when government investigators seek to interview corporate employees about possible regulatory violations. *See infra* notes 186-92 and accompanying text.

163. Moran v. Burbine, 475 U.S. 412 (1986).

164. MODEL RULES OF PROFESSIONAL CONDUCT scope note (1983).

165. 903 F.2d 731 (10th Cir.), *cert. denied*, 111 S. Ct. 152 (1990).

166. *Id.* at 739.

167. 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 111 S. Ct. 192 (1990).

168. *Id.* at 839. The meaning and vitality of the *Hammad* decision is unclear. The panel, aware of the possibility of a rehearing en banc, revised its opinion in *Hammad* to qualify some of its broad statements concerning the applicability of the communication rule to investigatory activities. *See supra* notes 90-93. The ultimate holding was that the district court abused its discretion in excluding the tapes and the revised opinion states that the anti-contact rule should not be applied so as to interfere with the use of informants in criminal investigations. *See id.*

tion of the anti-contact rule. Conversely, in *United States v. Partin*,[169] the Ninth Circuit found that a person already convicted, whose conviction had already been affirmed on appeal, was still a "party" within the meaning of the anti-contact rule.[170] *Partin* thus prolonged the rule's applicable period to include post-conviction contacts.

There is the further question of whether the prosecutor is himself a "party" who, unlike a lawyer, may directly communicate with an opposing party.[171] The prosecutor is a public official who makes all of the decisions that are normally made by the client: deciding whether to initiate a case, fixing its nature and scope, and taking steps to terminate it. The prosecutor makes these decisions not in a personal capacity, but as a representative of the public or the government. The amorphous nature of the prosecutor's "client" allows lawyers who oppose the government to communicate with government and law enforcement personnel without fear of violating the anti-contact rule.[172]

2. *The Subject of the Representation*

The anti-contact rule prohibits communication on the subject of the representation. The view that any represented person is a "party" must assume that at least the "subject matter" of representation has crystallized, even if no formal proceeding is required or has yet commenced. Several courts have rejected the rule's application to investigatory communications, on the ground that the subject matter of the representation is undefined at that point.[173] Thus the rule does not apply to

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169. 601 F.2d 1000, 1005-06 (9th Cir. 1979) (defendant asserted a violation of anti-contact rule after a previously-convicted co-defendant sharing the same counsel communicated with the FBI and the assistant United States attorney regarding the defendant; the court found a violation of the rule as to the already convicted co-defendant, but not as to the complaining defendant), *cert. denied*, 446 U.S. 964 (1980).

170. 601 F.2d at 1005. The court also found that although a "party," he was not an "accused" within the meaning of the Sixth Amendment.

171. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. 1 (1983).

172. Government witnesses, including police officers, may be interviewed by opposing lawyers without the prosecutor's knowledge or consent; they are not treated as within the ambit of the "party" whom the prosecutor represents. *See* Uviller, *supra* note 117, at 1137, 1180. A prosecutor may not counsel any person, including a police officer, to refuse to speak to defense lawyers. ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1986), Standard 3-3.1(c).

173. United States v. Ryans, 903 F.2d 731, 739 (10th Cir.), *cert. denied*, 111 S. Ct. 152 (1990); United States v. Lemonakis, 485 F.2d 941, 956 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974). In United States v. Guerrerio, 675 F. Supp. 1430 (S.D.N.Y. 1987), the prosecutor authorized a cooperating witness secretly to record a conversation with the target of a grand jury investigation, who was represented in that investigation. The court, rejecting the claim that the evidence should be suppressed because of violation of the anti-contact rule, held that the subject of

communications with a represented person while the subject of representation is still undefined, as when a general investigation of persons or businesses has not yet narrowed to particular activities.

Once a suspect has been charged, however, the scope of the representation is defined by the charge. Can a prosecutor or agents of the prosecutor communicate with a represented defendant concerning other matters? This question usually arises when an informant, with the knowledge of the prosecutor, talks with the represented defendant about related or unrelated crimes. The decisions are in disarray, some limiting the prohibition to the particular charge,[174] others extending it to related matters, and some appearing to bar communication as to any matter.[175]

The Justice Department position allows communication with represented persons on other charges, on the theory that the defendant is unrepresented in matters other than the pending charges.[176] *United States v. Masullo*[177] accepted this approach, finding no ethics violation when federal agents, knowing the defendant was represented by counsel on a state narcotics charge, stopped him as he was leaving his lawyer's office and questioned him regarding federal narcotics charges. As to the federal charge, the lawyer had not been retained, nor had the defendant's right to counsel attached.[178]

Hammad,[179] in which the court stated that communication regarding an arson investigation with a defendant represented on related charges of medicare fraud violated the rule, seems inconsistent with

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representation "is nebulous until the time of the formal initiation of the prosecution" and therefore "is often defined by the criminal charges ultimately brought against a defendant." *Id.* at 1438.

174. United States v. Masullo, 489 F.2d 217 (2d Cir. 1973); State v. Clawson, 270 S.E.2d 659 (W. Va. 1980) (defendant represented in New Jersey criminal proceeding could be questioned about unrelated murders committed in West Virginia).

175. People v. Sharp, 197 Cal. Rptr. 436 (Cal. Ct. App. 1983); *In re* Burrows, 629 P.2d 820 (Or. 1981); Oregon State Bar Op. 484 (Mar. 1983) (if discussion takes place on unrelated, uncharged offenses on which the lawyer has not been retained, "discussion of the pending case will undoubtedly take place"). The Oregon ethics opinion also stated that, because the lawyer's representation cannot include a client's ongoing or future crimes, the prosecutor or the prosecutor's agents may communicate with the client in a good-faith effort to thwart future criminal activity. *Id.*, *reprinted in* Laws. Man. on Prof. Conduct (ABA/BNA) ¶ 801:7111.

176. 4 Op. Off. Legal Counsel 576, 589 (1980).

177. 489 F.2d 217 (2d Cir. 1973).

178. *Id.* at 222-23.

179. United States v. Hammad, 858 F.2d 834 (2d Cir. 1988) (anti-contact rule is applicable to prosecutors, but customary investigatory activity involving informants is "authorized by law"), *cert. denied*, 111 S. Ct. 192 (1990); *see supra* notes 90-93, 167-68 and accompanying text.

Masullo. The Third Circuit also has expressed "unease" with the view that a federal prosecutor may communicate with a defendant on unrelated matters.[180] New York now allows contact on unrelated matters,[181] but California rejects this interpretation. California's courts and bar ethics committee hold that a party is represented by counsel if there is counsel of record, whether or not counsel is authorized to act for the party in any matter. A lawyer may not communicate with a represented defendant even if communication is limited to an inquiry into conduct for which the defendant has not been charged.[182]

Inquiries into certain related matters appear to be permitted under the rules.[183] The fact that a lawyer represents a person for a particular matter does not extend the lawyer's representation to all of the person's prior or subsequent conduct. Ethics rules prohibit a lawyer from assisting a client with criminal conduct; an advance agreement to represent a client in all matters arising out of a course of criminal conduct constitutes prohibited assistance.[184] Thus a representation must be limited to specific, past crimes. When a represented person is thought to be engaged in a continuous course of criminal conduct, there are good reasons for permitting law enforcement officials to make investigatory contacts concerning matters subsequent to the pending charged offense on which the suspect is represented. The contrary result immunizes a person from investigatory contacts on unrelated matters during the pen-

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180. United States v. Crook, 502 F.2d 1378, 1380 (3d Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975).

181. Until recently, New York also held, based partially on the anti-contact rule, that all communication with a defendant was proscribed once the defendant was represented by counsel in *any* matter. In 1990 it rejected that rule as unworkable. People v. Bing, 558 N.E.2d 1011 (N.Y. 1990) (overruling People v. Bartolomeo, 423 N.E.2d 371 (N.Y. 1981)).

182. People v. Sharp, 197 Cal. Rptr. 436, 439-40 (Cal. Ct. App. 1983). The court reasoned that because of a prosecutor's position of authority, "contact carries an implication of leniency for cooperative defendants or harsher treatment for the uncooperative" and impedes defense counsel's ability to negotiate a plea bargain. *Id.* The new rules, however, do not apply the anti-contact rule to the investigatory stage that precedes formal charges. *See* CAL. R.P.C. 2-100 discussion (1988).

183.

> [The rule] does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. (1983).

184. The Model Rules prohibit a lawyer from assisting a client in criminal conduct; criminal defense incident to a general retainer for legal services to a criminal enterprise constitutes such prohibited assistance. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) & cmt. (1983).

dency of charges, which may run for a period of years from arrest to disposition of an appeal.

If the principal purposes of the anti-contact rule are to shield an unsophisticated client from overreaching on the part of the adversary's lawyer and to safeguard the lawyer-client relationship from improper interference, then there is a strong argument for treating the subject of representation as limited to the circumstances of the particular investigation or charge. The lawful use of informants or other investigatory procedures in connection with other charges, related or unrelated, involves matters in which a lawyer's presence can accomplish nothing other than the admonition to remain silent. The real question is the proper use of investigatory means to probe a suspect's mind, not the defendant's relationship with counsel, and the constitutional decisions deal explicitly with this issue.[185]

3. *Representation by a Lawyer*

When is a person "represented by a lawyer?" Many of the difficulties in applying this language are created by the use of the words "party" and "subject of representation." Additional problems, however, are present when the party to a legal matter is not a person but an entity. If, for example, the government investigates a large corporation for procurement fraud, most certainly the corporation is represented by counsel. But what of its numerous employees? What of former employees? The problem is exacerbated where the investigation is itself triggered by a "whistle-blowing" employee who may be not only unaware, but undesiring, of corporate representation.

Courts have resolved this problem in a number of ways. Under the "control group" approach, only those corporate employees who manage and speak for the corporation are viewed as the represented party.[186] The Model Rules' commentary extends representation to anyone whose

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185. *See* Uviller, *supra* note 117 *passim*.

186. *See* Wright *ex rel.* Wright v. Group Health Hosp., 691 P.2d 564 (Wash. 1984). The competing interests are well balanced in Niesig v. Team I, 558 N.E.2d 1030 (N.Y. 1990). The court held that the lawyer for an injured worker could interview all of a corporate defendant's employees with the exception of those who had the legal power to bind the corporation in the matter. The anti-contact rule does not prohibit direct access to other employees, including those who witnessed the event for which the corporate employer was sued. The court rejected tests that turn on the admissibility of evidence or require case by case balancing as unduly interfering with information gathering or as vague and unworkable. The *Niesig* court specifically rejected the definition of "party" included in the comment to Model Rule 4.2 on the ground that it would "unnecessarily curtail informal factgathering." *Id.* at 1036 n.6.

actions or omissions may be imputed to the corporation for purposes of liability.[187] Under the Federal Rules of Evidence, this encompasses a much broader range of employees than the control group approach.[188] One problem with this interpretation is its uncertainty and lack of predictability.[189] In rejecting this approach, the Washington Supreme Court noted that the rule's purpose is not "to protect a corporate party from the revelation of prejudicial facts"[190] and that such usage conflicts with policies favoring the easy accessibility of evidence to all litigants.[191]

Extending the concept of representation to include most or all employees of a named corporate party imposes significant disabilities upon the employees as well as the adverse party. Where the government is investigating possible corporate wrongdoing, an employee may have information that is helpful to herself but harmful to the corporation. Or, she may have information harmful to both which she seeks to offer against the corporation in exchange for leniency for herself. As one court stated, the corporation

> has no right to decide for its employees whether its interests are in conflict with theirs when the Department [of Justice] seeks their testimony in the course of an investigation of law violations. . . . [A]ny employees who conclude that their interests are not in conflict with [the corporation's] are free to notify it . . . and ask the company for representation.[192]

The issue in these cases is not overreaching by opposing counsel or improper interference with the lawyer-client relationship. In these situations the represented party is usually a large corporation or entity—a sophisticated user of legal services. The government's investigatory activity does not affect the lawyer-client relationship between corporate counsel and the corporation.[193] Since the employees in question are not

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187. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. (1983).

188. *See* FED. R EVID. 801(d)(2)(D); Morrison v. Brandeis University, 125 F.R.D. 14 (D. Mass. 1989).

189. *Compare* Curley v. Cumberland Farms, Inc., 134 F.R.D. 77 (D.N.J. 1991) (rule does not preclude informal contacts with former employees) *with* Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs., Ltd., 745 F. Supp. 1037 (D.N.J. 1990) (rule prohibits informal contacts with former employees).

190. *Wright*, 691 P.2d at 569.

191. *Id.*

192. United States v. Western Elec. Co., 1990-2 Trade Cas. (CCH) ¶ 69,148 (D.D.C. 1990).

193. A lawyer for the corporation is unlikely to also represent the individuals whom the government seeks to interview in its investigation. Although communications from these individuals to the corporation's lawyer may fall within the corporation's attorney-client privilege, the cor-

personally represented by the corporation's counsel, the purpose appears to be burdening the government's access to information rather than protecting the lawyer-client relationship. What is involved is an effort by corporate clients and their lawyers to control information and to manage its flow to actual or potential adversaries.[194]

Requiring the government (or a private plaintiff)[195] to use formal litigation procedures to obtain information from past and present company employees imposes substantial delays and costs on the information-gathering process. Moreover, the information is often sought in order to make a determination as to whether or not formal proceedings are necessary. Further, the presence of corporate counsel during these discovery proceedings may deter employees who wish to cooperate due to fear that retaliation will flow from the provision of information.[196]

Positive law outside the lawyer's ethics context generally embodies

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poration can also waive confidentiality and use the information against the employee. *See* John E. Sexton, *A Post-*Upjohn *Consideration of the Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443 (1982) (criticizing Upjohn Co. v. United States, 449 U.S. 383 (1981), for failing to protect corporate employees who provide information to the corporation's lawyer). These individuals gain the protection of the attorney-client privilege only when consulting a separate lawyer, not the corporation's lawyer, who should advise them that she is the corporation's lawyer and does not represent individual employees. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.13, 4.3 (1983).

194. In *Western Elec. Co.*, the defendant corporation moved to prohibit the government from interviewing certain present and former company employees as part of the Justice Department's investigation of company compliance with a court decree. In rejecting the motion, the court stated that application of Model Rule 4.2 to bar contacts with employees except through the company's counsel "would be an obvious prescription for frustrating investigations into wrongdoing" and the claim that former employees were "represented" by corporate counsel was a "bald attempt by the company to shield itself and its management from investigation of possible wrongdoing . . . ." 1990-2 Trade Cas. (CCH) ¶ 69,148 (D.D.C. 1990); *see also* Times-Mirror Co. v. United States, 873 F.2d 1210, 1214-16 (9th Cir. 1989).

195. The bar is deeply divided on the issue of whether the anti-contact rule should be interpreted to prohibit informal interviews with corporate employees who are not in a position to bind the corporation. The corporate defense bar prefers a broad application of the rule, sometimes even extending to all former employees, while the plaintiffs' bar supports government lawyers in opposing a broad interpretation of the anti-contact rule. *E.g.* Morrison v. Brandeis University, 125 F.R.D. 14 (D. Mass. 1989) (plaintiff seeking discovery in alleged sex discrimination suit opposed broad interpretation of anti-contact rule). The situation is different than in the criminal justice field, where the organized bar tends to unite in support of the views of defense lawyers against those of prosecutors.

196. The proposed Restatement of the Law Governing Lawyers takes the position that a lawyer opposing a represented entity may interview agents or former agents of the entity except to the extent that the agents are in a position to legally bind the entity. ALI, RESTATEMENT OF THE LAW GOVERNING LAWYERS § 167 (Tent. Draft No. 7, 1991) (Reporter's note to comment e). The anti-contact rule does not bar direct contacts with agents merely because the agent's information will be admissible in evidence against the entity and the entity may be liable to a third person because the information involves wrongdoing of an agent that may be imputed to the entity for purposes of vicarious liability.

policies supporting disclosure and free access to information. In many circumstances, "whistle-blower" laws provide explicit protection to employees who disclose information of corporate wrongdoing.[197] The discovery provisions of the modern procedural rules, particularly the Federal Rules of Civil Procedure, express a policy favoring liberal access to information. These substantive and procedural laws urge an interpretation of the anti-contact rule that does not conflict with their underlying policies.

4. Consent of the Lawyer

The anti-contact rule excepts contacts made with "the consent of the other lawyer." This language does not expressly provide for consent or waiver by that lawyer's client, the contacted party. Nor does it permit mere notice to opposing counsel, such as when a lawyer sends a letter to the opposing lawyer with a copy to that lawyer's client.[198]

Many important rights, even constitutional rights such as the right to counsel, may be waived. Moreover, the right to rely on counsel as the medium for communications with the adversary is personal to the client; his lawyer may not assert it on her own behalf. But a client cannot waive a lawyer's ethical obligations unless the particular rule contemplates client consent.[199] And unlike many other ethics rules designed to protect clients, the anti-contact rule may not be waived by the client; only the client's lawyer may waive it.[200] The rule appears to apply even in situations in which the client has good reason for dealing

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197. More than a dozen federal laws protect private-sector whistle-blowers from job retaliation for complaints of discrimination, 42 U.S.C. §§ 2000e-3a (1988); information about false claims against the government, 31 U.S.C. § 3729(a)(7)(A) (1988); and in health and safety contexts. *See generally* Eugene R. Fidell, *Federal Protection of Private Sector Health and Safety Whistleblowers*, 2 ADMIN. L.J. 1 (1988); R. Taylor Abbot, Jr., Note, *Remedies for Employees Discharged for Reporting an Employer's Violation of Federal Law*, 42 WASH. & LEE L. REV. 1383 (1985).

198. *See* Leubsdorf, *supra* note 3, at 703-07 (discussing the consent issue and arguing that written communications with a represented party, with a copy to the party's lawyer, should be permitted).

199. Some basic obligations of a lawyer cannot be waived by a client. For example, a client cannot consent to incompetent representation, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983), an unreasonable fee, *id.* at Rule 1.5(a), or a direct and extreme conflict of interest so severe as to undermine duties of loyalty, competence, and confidentiality, *id.* at Rule 1.7 cmt. On the other hand, a client may consent to a limited scope of representation, *id.* at Rule 1.2(c), to disclosure of otherwise confidential information, *id.* at Rule 1.6, and to waiver of most conflicts of interest, *id.* at Rules 1.7-1.9.

200. *See supra* note 3. The authors are not aware of any state formulation of the anti-contact rule that permits waiver of the rule by the lawyer's client. *But see infra* note 208.

directly with an opposing party's lawyers, such as when the client believes that his own lawyer has an actual or emerging conflict of interest.[201] Insofar as it denies a client the ability to consent to such direct contacts, the anti-contact rule is overly paternalistic.

The rule may be based on an assumption that clients generally are not in a position to make informed waivers. There is the further possibility, however, that one objective of the rule is to further the interests of lawyers without regard to the views or interests of the client.[202] California courts frankly acknowledge the anti-contact rule as protection for the attorney: "[T]he rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role."[203] In this respect, the rule goes farther than it should in putting lawyers in a position of control in the lawyer-client relationship.

In direct contradiction to the rule's express language, many courts have interpreted the anti-contact rule to allow a party to waive its protection;[204] to require only presence of defense counsel and not consent;[205] or to be satisfied by notice and opportunity to be present,[206] rather than counsel's consent.[207] There is no textual basis in the Model

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201. The client, for example, may believe that his lawyer is not forwarding settlement offers to him in a situation where it is in the client's interest to settle but the lawyer wants to hold out until or after trial. Although the lawyer's conduct violates professional rules (Model Rule 1.4 requires a lawyer to communicate a settlement offer to her client, and Model Rule 1.2(a) allocates the decision to settle to the client), the client cannot enforce these rules by seeking information from the opposing party's lawyer. Nor may that lawyer, knowing or suspecting that the settlement offer has not been communicated to the opposing party, communicate with that party. The anti-contact rule, however, does permit adverse parties to communicate directly with one another, providing the contact is not stimulated by one of the lawyers and designed to circumvent the anti-contact rule. Professor Leubsdorf argues persuasively that the anti-contact rule is overly broad in some of its applications, placing the interests of lawyers above those of their clients. Leubsdorf, *supra* note 3 *passim*.

202. *Id.*

203. Mitton v. State Bar, 455 P.2d 753, 758 (Cal. 1969).

204. *E.g.*, United States v. Cobbs, 481 F.2d 196, 200 (3d Cir.), *cert. denied*, 414 U.S. 980 (1973); United States v. Smith, 379 F.2d 628, 633-34 (7th Cir.), *cert. denied*, 389 U.S. 993 (1967); *cf.* United States v. Monti, 557 F.2d 899, 904 (1st Cir. 1977) (suppression of voluntary statements "served no useful purpose;" no indication whether contact following waiver constituted ethics violation).

205. State v. Richmond, 560 P.2d 41, 46 (Ariz. 1976).

206. United States v. Thomas, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); United States v. Four Star, 428 F.2d 1406, 1407 (9th Cir.), *cert. denied*, 400 U.S. 947 (1970).

207. At the very least, statements made after a waiver will not be suppressed, even if the communication is an ethics violation (which a court may refrain from deciding). Where communication was initiated and arranged by a party's wife, for example, the court held government con-

Rule for these interpretations.[208] At least one court has criticized this approach, emphasizing that the rule does not contemplate waiver and that either defendants should be encouraged to get new counsel before whom they can speak freely, or the rule itself should be substantially modified.[209]

Yet these judicial modifications reflect sound attempts to reconcile the anti-contact rule with substantive law. Perhaps these courts simply grafted the Sixth Amendment's recognition of waiver of the right to counsel onto the ethics rule. Certainly arguments of simplicity, uniformity, and convenience support interpreting the rule's protections in accordance with Sixth Amendment precedent, which permits an informed waiver.[210] But implying a "client waiver" in the rule serves important policies as well. Such an interpretation limits the rule's capacity to be exploited for the benefit of counsel and results in an ethics rule that protects clients, not lawyers. It serves individual autonomy, a fundamental value that lies at the core of much substantive law. It also permits clients to protect their best interests in conflict-of-interest situations, such as when they determine, against their lawyers' advice, that their best interests require cooperation with the government. Moreover, permitting client waiver also furthers the broader social policies of facilitating the prevention and detection of crimes and enhancing the

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tact with the party not improper, although "as a general matter" an attorney should respect the prohibition on communication. United States v. Woods, 544 F.2d 242, 255 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977); *see also* United States v. Monti, 557 F.2d 899, 904 (1st Cir. 1977); United States v. Springer, 460 F.2d 1344, 1354 (7th Cir. 1972).

208. Comments to the District of Columbia's version of the anti-contact rule, however, state that the rule is not designed to regulate law enforcement activities of government prosecutors, which are regulated by a large body of decisional law. D.C. R.P.C. 4.2 cmt. (1991). A defendant who is represented by counsel may seek to communicate with the prosecution without notice to defense counsel. *Id.* Although "communications between charged defendants and the government without notice to defense counsel must be viewed with suspicion, such communications cannot be prohibited in all instances." *Id.*, *reprinted in* Laws. Man. on Prof. Conduct (ABA/BNA) ¶ 01:38; *see also* Freedman, *supra* note 55, at 22 (discussing the consideration and adoption of this comment).

The Federal Bar Association's proposed ethics rules for federal lawyers also permit client consent in criminal matters: contact with a represented party is prohibited "unless . . . . in a criminal matter, the individual initiates the communication with the Government lawyer and voluntarily and knowingly waives the right to counsel for the purposes of that communication; or the Federal lawyer otherwise is authorized by law to [communicate directly]." MODEL RULES OF PROFESSIONAL CONDUCT FOR FEDERAL LAWYERS Rule 4.2 (Draft Dec. 1990).

209. United States v. Batchelor, 484 F.Supp. 812 (E.D. Pa. 1980) (citing Leubsdorf, *supra* note 3).

210. *See supra* notes 147-48 and accompanying text.

fact-finding aspects of the legal process, by allowing those who are willing to volunteer information to do so.

Since client consent to direct contact is often permitted in criminal proceedings, one may well question the logic in the rule's strict application to civil cases.

> If a defendant is judged capable of deciding whether to submit to interrogation, why should other clients be denied the same right? . . . The fact is that the gentlemanly courtesies that gave rise to [the anti-contact rule], although they may endure in the chambers of ethics committees, have not survived exposure to the more critical world of adversary criminal litigation.[211]

5. *Application to Non-lawyers*

Ethics rules expressly prohibit a lawyer from using others to circumvent the rules' requirements.[212] Thus, under both the Model Code and the Model Rules, some courts extended the anti-contact rule to apply to contacts with represented parties by investigators, and even by informants, if made at a lawyer's direction.[213] But other courts have held the rule inapplicable to conduct by law enforcement personnel who are not lawyers.[214] Taking an intermediary position, most courts limit application of the rule to non-lawyers to those who act as an attorney's "alter ego."[215] This middle ground represents the best balance of contending considerations.[216]

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211. Leubsdorf, *supra* note 3, at 702.

212. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(a) (1983) (misconduct for a lawyer to violate the rules "through the acts of another"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1969) ("communicate or cause another to communicate"). Even without this explicit language, agency law would probably produce the same result.

213. *See, e.g.*, United States v. Hammad, 846 F.2d 855, 859 (2d Cir. 1988); United States v. Thomas, 474 F.2d 110, 112 (10th Cir.) (enforcement officials are agents of the prosecuting party), *cert. denied*, 412 U.S. 932 (1973); *In re* Burrows, 629 P.2d 820 (Or. 1981).

214. Where no attorney was involved, for example, *United States v. Scarpelli* refused to extend the rule to FBI agents on the basis of the rule's "philosophical underpinnings," finding no literal violation of the rule. United States v. Scarpelli, 713 F. Supp. 1144, 1159 n.25 (N.D. Ill. 1989); *see also* State v. Richmond, 560 P.2d 41, 46 (Ariz. 1976) (law enforcement officers need only comply with constitutional requirements, not ethics rules).

215. *See* United States v. Jamil, 707 F.2d 638, 646 (2d Cir. 1983) (no ethics violations where attorney was neither involved in nor aware of surreptitious contact with represented defendant); Reinke v. United States, 405 F.2d 228, 230 (9th Cir. 1968).

216. The status and role of investigatory personnel are generally different at the state and local level than they are at the federal level. Most federal investigatory personnel (e.g., FBI agents) are part of an executive department in which a lawyer, the Attorney General of the United States, is the ultimate head. More important, federal investigations tend to involve more complex crimes in which federal prosecutors are involved on a day-by-day basis as advisers and

Whether an investigator or informant represents a lawyer's "alter ego" should depend on the lawyer's directions regarding the communication. For example, the anti-contact rule seems most obviously violated where the communication constitutes a clandestine interrogation by a lawyer[217] or delves into defense strategy.[218] Such conduct also violates the Sixth Amendment.[219] On the other hand, contacts by an investigator who merely notifies a lawyer of his intention to speak with a represented person; who is specifically instructed to avoid matters of defense strategy; or who contacts a represented person in an undercover investigation that seeks to gather information before charges are even contemplated, much less filed, should not fall within the rule's ambit.[220] In such situations, the rule's central purpose of protecting a person from overreaching by an opposing lawyer is not implicated. Instead, the concern is that the suspect, by revealing the truth, has provided highly probative evidence to the prosecution. The anti-contact rule, however, was not formulated to prevent government from acquiring relevant information. Only if the anti-contact rule is interpreted as protecting the interests of lawyers in controlling the flow of information does it prohibit pre-indictment contacts that are otherwise permissible.

Case law holding that an agent acting independently of a lawyer is outside the rule encourages investigators to withhold information from prosecutors, to enable greater freedom of action. Following the Ninth

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supervisors. At the state and local level, police generally operate under a separate jurisdictional authority and prosecutors usually are not consulted until the police have finished their work. Investigations of organized crime or white collar crime, unlike those involving street crime, usually involve prosecutorial involvement. If the anti-contact rule turns on whether or not a person acting as a lawyer participates in any way in an investigatory contact, the rule has much broader effects on federal criminal investigations and on those in which prospective defendants are more likely to have ongoing legal representation (e.g., drug rings or ongoing corporate fraud). In effect, the rule so interpreted provides favored treatment to this class of criminal defendants.

217. *E.g.*, United States v. Lemonakis, 485 F.2d 941, 955 n.23 (D.C. Cir. 1973) (rule prohibits questioning by "official members of prosecutorial effort" when knowledge is sharpened by the factual posture of the case); United States v. Massiah, 307 F.2d 62, 66 (2d Cir. 1962) (rule prohibits a lawyer's "artfully contrived questions" that trick a defendant into giving his case away), *rev'd on other grounds*, 377 U.S. 201 (1964).

218. *Cf.* United States v. Hammad, 858 F.2d 834, 836, 840 (2d Cir. 1988) (violation of rule where prosecutor issued informant sham subpoena to induce defendant's admissions, told informant what to say, defendant discussed subpoena and strategies to avoid compliance), *cert. denied*, 111 S. Ct. 192 (1990); *but cf.* United States v. Ryans, 903 F.2d 731, 733 (10th Cir.) (no violation although prosecutor was aware that defendant, at informant's prompting, discussed his attorney's advice), *cert. denied*, 111 S. Ct. 152 (1990).

219. *See* Weatherford v. Bursey, 429 U.S. 545, 554 (1977).

220. *See* Green, *supra* note 117, at 318-20.

Circuit's decision in *United States v. Partin*,[221] the FBI in that region split up prosecution teams. To avoid claimed violations of the anti-contact rule, agents did not inform assistant U.S. attorneys of interviews with uncounseled suspects.[222] This compromise has the undesirable effect of eroding a prosecutor's ability to advise agents as to the proper conduct of an investigation, increasing the danger that a suspect's constitutional rights will be inadvertently violated. Resulting evidence exclusions and conviction reversals then reduce the efficacy of prosecution efforts. An appropriate balance of competing considerations would prohibit the prosecutor from direct contact with a represented party but exclude most pre-charge, non-custodial investigatory activity from the ambit of the rule, whether or not the prosecutor was informed about the investigation or provided legal advice. If the contacts were intended to interfere with the target's relationship with his lawyer or designed to reveal legal strategy, the anti-contact rule would then come into play.

6. *Authorized by Law*

The most convenient textual basis for exempting much investigative and prosecutorial activity from the requirements of the anti-contact rule appears in the rule's second exception: an express exemption for communications "authorized by law." Surprisingly, the decisions carry very little informed discussion of this issue. Those decisions that decline to apply the anti-contact rule to pre-indictment investigatory activity generally do so on other grounds. And many of the post-indictment contacts permitted with represented defendants involve an express waiver.

United States v. Hammad[223] is a rare decision in that the court relied on the "authorized by law" language to permit some contacts with represented persons. The original opinion in *Hammad* startled the law enforcement community by stating broadly that suppression of evidence could be based on a violation of the anti-contact rule at the in-

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221. 601 F.2d 1000 (9th Cir. 1979), *cert. denied*, 446 U.S. 964 (1980); *see supra* note 169, *infra* note 232 and accompanying text.

222. 4 Op. Off. Legal Counsel 576, 579 (1980).

223. United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 111 S. Ct. 192 (1990) (discussed at *supra* notes 90-93, 167-68 and accompanying text); *see also* State v. Wolf, 643 P.2d 1101 (Kan. Ct. App. 1982) (prosecutor's communications with represented individuals are "authorized by law" when consistent with constitutional restraints). A prosecutor may also question a represented defendant before a grand jury without counsel's consent, as such contact is authorized by law. United States v. Schwimmer, 882 F.2d 22, 28-29 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

vestigatory stage prior to formal charges. The amended opinion withdrew much of the decision's sting by holding that the "authorized by law" language permitted "legitimate investigation techniques."[224] Although the court declined to define the scope of the exception, it stated that the use of informants to gather evidence generally will fall within the permitted boundaries.[225]

Available material give few clues to the interpretation of "authorized by law." Comments to Model Rule 4.2 provide the example that a party in litigation with the government need not communicate only through the government's lawyers but may contact other government officials directly.[226] The source of this authorization is the constitutional right to petition government for redress.[227] Thus the rule itself recognizes that its application to government lawyers and clients is subject to general principles of law. An early version of the comments to Model Rule 4.2 included language protective of established law enforcement techniques, and the local rule adopted by the District of Columbia carries a comment specifically recognizing that the rule is not intended to prohibit these governmental functions.[228]

The Department of Justice asserts the broad view that all federal law enforcement activities, so long as constitutional, are "authorized by law" pursuant to title 28, section 533 of the U.S. Code.[229] Regardless of the validity of this claim, the statute applies only to FBI agents; it does not address the larger problem of the activities of lawyers themselves.

The Department also asserts that party-initiated contacts following a valid waiver of the right to counsel are authorized by law, based on the constitutional right to self-representation recognized in *Faretta v. California*.[230] However, the fact that an accused has a right to forego a lawyer's help does not mean that one who accepts a lawyer's help gets to call all the shots. Once a client accepts representation, a court will permit the lawyer to control certain aspects of the representation.[231]

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224. 858 F.2d at 839.

225. *Id.*

226. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. (1983).

227. Vega v. Bloomsburgh, 427 F. Supp. 593 (D. Mass. 1977).

228. *See* Thornburgh, *supra* note 85, at 290.

229. 4 Op. Off. Legal Counsel 576, 581-84 (1980). The Justice Department concedes, however, that "numerous cases have scrutinized FBI conduct under the rule and none has suggested that all the FBI's investigatory activities fall within the 'authorized by law' exception." *Id.*

230. *Id.* at 591 (citing Faretta v. California, 422 U.S. 806 (1975)).

231. *Cf.* Jones v. Barnes, 463 U.S. 745 (1983) (failure of appointed lawyer for a criminal

One may argue that any waiver of counsel should be one such aspect, because of the potential for prejudice to the case during uncounseled contacts with the opponent. Strictly read, the anti-contact rule requires a represented defendant's lawyer to consent to the waiver before communications may occur.

Concerns regarding prejudice can, however, be addressed by requiring judicial verification of waivers. Where the defendant voluntarily and intelligently initiates the communication, a requirement of counsel's permission is overly paternalistic at best. At worst, it may be frustrating, disabling, or even dangerous to the client.[232] Federal law gives all persons in federal cases the right to "plead and conduct their own cases personally."[233] A lawyer's respect for the exercise of that right scarcely seems unethical.

Federal law also requires courts to admit as evidence defendants' statements that are voluntarily made.[234] Although safeguards are necessary to ensure that voluntariness includes some level of comprehension of consequences, it is nevertheless clear that defendants are permitted to make these statements and courts must receive them. Arguably, then, if statements are volunteered to law enforcement officials, they likewise must permit a defendant an opportunity to speak.[235]

The Fourth Circuit rejected this position in *United States v. Chavez*,[236] holding that the rule forbids any ex parte communication, by government agents as well as lawyers, even where a party has initiated it. *Chavez* involved a defendant in custody who, mistrustful of his lawyer and wishing to cooperate, contacted an FBI agent once prior to trial and three times after being convicted. In their discussions, the agent told the defendant they could not speak because the defendant was represented by counsel and told him "you either need to let this attorney know that you want to talk to the FBI and/or the prosecutor. And if you don't trust your attorney, then you need to let the court

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appeal to raise all questions requested by convicted defendant is not ineffective assistance of counsel).

232. *Cf.* United States v. Partin, 601 F.2d 1000 (9th Cir. 1979), *cert. denied*, 446 U.S. 964 (1980).

233. 28 U.S.C. § 1654 (1988).

234. *See* 18 U.S.C. § 3501(a) (1988).

235. *See* United States v. Crook, 502 F.2d 1378, 1380-81 (3d Cir. 1974) (relying on 18 U.S.C. § 3501, the court found no violation of the anti-contact rule where an arraigned, represented defendant in custody initiated a conversation with an FBI agent), *cert. denied*, 419 U.S. 1123 (1975).

236. United States v. Chavez, 902 F.2d 259 (4th Cir. 1990).

know."[237] The court found this conversation disturbing and admonished the government for violating the anti-contact rule by not terminating the conversation, thus weakening the lawyer-client relationship.[238]

The anti-contact rule, as interpreted and applied in *Chavez*, has little or nothing to do with possible interference with the lawyer-client relationship—at least, insofar as interference connotes an adverse effect on the client. The initiative came from the client, who believed that his lawyer was failing to look after his interests. The prosecutor's agent in *Chavez* did not provide legal advice other than to state that the client should take his problem to the court. This situation normally arises in contexts in which there is a strong suspicion that the lawyer is preferring the interests of other clients or of someone who is paying the lawyer. Under the *Chavez* court's approach, the wishes and interests of the client disappear; all that is left is a wooden recital that protects the interests of a defense lawyer who may well be acting against the client's interests.[239]

7. *Remedies*

Courts generally hold that a breach of the anti-contact rule alone violates no rights of a party, but merely provides grounds for disciplinary action against the lawyer. Courts that find violations of the anti-contact rule are reluctant to apply an exclusionary rule to forbid use of the evidence.[240] To merit suppression of evidence or a new trial, the violation must result in substantial prejudice to a defendant; in effect, it must rise to the level of a constitutional violation.[241] Party-initiated

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237. *Id.* at 266.

238. Referring to the Justice Department's policy of allowing party-initiated contacts, the court commented, "[a]lthough the merits of this policy are not before us, we note that it is inconsistent with our decision today." *Id.* at 266 n.9.

239. Supreme Court decisions concerning constitutional criminal procedure adopt a client representation model involving a paternalistic relationship between the defendant and defense counsel. The decisions make the defendant's constitutional rights turn on steps taken or not taken by defense counsel, and bind the defendant with his lawyer's errors and procedural defaults. *See supra* notes 149-51. Relief is only granted for departures from ordinary norms which constitute ineffective assistance of counsel. *See* Strickland v. Washington, 466 U.S. 668 (1984). Permitting the prosecutor to bring to the attention of the court situations in which the defense lawyer may not be acting in the best interest of her client, for such action as the court may deem appropriate, is one way of assuring fairness to criminal defendants otherwise dependent on their lawyers.

240. United States v. Chavez, 902 F.2d 259 (4th Cir. 1990); United States v. Partin, 601 F.2d 1000 (9th Cir. 1979), *cert. denied*, 446 U.S. 964 (1980). No disciplinary proceedings against an attorney under these circumstances have been discovered by the authors.

241. *E.g.*, *Chavez*, 902 F.2d at 266 (not every interference with counsel warrants a new trial).

contacts are rarely held to result in such prejudice and so generally are not grounds for suppression of evidence or a new trial. If a prosecutor talks with a represented defendant, any resulting evidence almost certainly may be used against others, whose rights have not been violated.[242]

This approach, with its focus on a defendant's rights, mirrors the analysis required by other positive law involving counsel. It reflects the older view that ethics rules simply impose duties on lawyers and do not vest legally enforceable rights in third parties. So long as it prevails, the anti-contact rule effectively has no operation in non-disciplinary proceedings.

E. The Lopez *Case*

United States v. Lopez[243] is the first case in which a court ordered a federal criminal charge dismissed because the federal prosecutor, relying on Justice Department practice, talked with an indicted defendant without the consent or presence of the defense lawyer. The *Lopez* case provides a useful vehicle for considering the questions raised when the anti-contact rule is applied to federal prosecutors.

Jose Lopez was indicted along with two co-defendants on several charges involving the distribution of cocaine and heroin.[244] Lopez retained an experienced defense lawyer, Barry Tarlow, but the representation was conditioned upon Lopez not cooperating with the government.[245] Tarlow refused to represent Lopez in any plea negotiations. The prosecutor, however, refused to offer a plea bargain to Lopez's co-defendant unless Lopez also entered a plea agreement. Lopez, who was in jail pending trial, was concerned about his family and desired to cooperate if it meant that he would be released.[246] However, if the case went to trial, he wanted Tarlow as his lawyer.[247]

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242. *Partin*, 601 F.2d at 1006; *see* United States v. Payner, 447 U.S. 727, 735 (1980).

243. 765 F. Supp. 1433 (N.D. Cal. 1991).

244. *Id.* at 1438.

245. *Id.* at 1438-39.

246. *Id.* at 1439. The source of this concern was revealed at the hearing as being fear of child abuse or endangerment from the mother's activities. Apparently the prosecutor understood Lopez's concern to stem from a drug source that had apparently threatened the defendant's family. Lopez wanted to keep Tarlow out of plea negotiations because his codefendant's lawyer told him Tarlow wasn't needed and negotiations would be easier without him, and because he didn't want Tarlow to drop his case. The prosecutor assumed that Lopez wanted Tarlow excluded because he had been hired by a narcotics ringleader and would reveal Lopez's cooperation, endangering Lopez's family.

247. *Id.* at 1440.

To explore the possibility of early release and yet keep Tarlow as counsel, Lopez used his co-defendant's lawyer to initiate discussions with the prosecutor. The prosecutor then asked the court to intervene.[248] During two *in camera* interviews with Lopez, the magistrate warned him of the danger of meeting with the prosecutor without the assistance of counsel and advised him that Tarlow or another lawyer could assist him.[249] The magistrate read to Lopez, and he signed, a written waiver stating that he wished to speak to the government without Tarlow present and that he did not believe Tarlow represented his best interests in the matter.[250] Eventually Lopez, the co-defendant and the codefendant's lawyer began plea discussions with the prosecutor, without disclosing this to Tarlow.

When Tarlow learned of Lopez's meetings with the prosecutor, he withdrew; Lopez's successor counsel then moved to dismiss the indictment on the grounds that the government had violated Lopez's Sixth Amendment right to counsel and the anti-contact rule.[251] The district court held that Lopez's Sixth Amendment rights had not been violated, but that the government's violation of the anti-contact rule required dismissal of the indictment.[252]

The *Lopez* case illustrates how an intelligent judge may be mislead in interpreting and applying the anti-contact rule. First, what implications arise from a person's initiation of a communication with the government? The anti-contact rule recognizes that a defendant may contact the government without the consent of the *government's* lawyer, because the Constitution ensures the right to petition the government for grievances.[253] Under the *Lopez* court's approach, however, the rule does not permit such contacts without the consent of the defendant's *own* lawyer. But every citizen, including one who is represented by counsel, retains the constitutional right to petition government officials.

Second, what implications for counsel's presence and assistance arise from the fact of a voluntary and knowing waiver before a judicial officer? The anti-contact rule recognizes that counsel's consent is not needed for contacts authorized by law. Surely prior judicial approval of

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248. *Id.* at 1441.
249. *Id.* at 1441-43.
250. *Id.* at 1441.
251. *Id.* at 1444.
252. *Id.* at 1461, 1464.
253. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. (1983).

a contact should constitute authorization by law. The *Lopez* court, however, summarily dismissed the fact of prior judicial approval because it concluded that the magistrate was "operating under [a] mistaken assumption" and that the prosecutor "misinformed" the court.[254] Even if this were true—and it is far from clear whether or not it is—the magistrate's misunderstanding could only extend to Lopez's *motives* for wanting a secret communication with the prosecutor.[255] Lopez himself appeared before the magistrate, was questioned, was warned about the risks of talking to the prosecutor without counsel present, insisted on proceeding without counsel, and, for his own reasons, did not want his own lawyer to be informed about the communication.[256] The magistrate's misunderstanding of Lopez's reasons does not vitiate that consent. The judicially-approved conversations should be viewed as authorized by law.

Third, should the anti-contact rule be interpreted to protect lawyers' interests as well as clients' interests? The *Lopez* court acknowledged that in that case, the prosecutor did not seek evidence against Lopez himself, that all communications were off the record and would not be used against Lopez, and that Lopez was not legally prejudiced

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254. *Lopez*, 765 F. Supp. at 1152, 1160.

255. *See supra* note 246.

256. The most puzzling aspect of *Lopez* is the court's failure to discern that there was a genuine conflict of interest between Lopez and his lawyer, Tarlow. Tarlow, by conditioning his representation of Lopez on an abandonment by Lopez of any plea negotiations, restricted the scope of representation in violation of professional ethics. Professional rules require a lawyer to "abide by the client's decision . . . as to a plea to be entered," and an agreement limiting the scope of representation that deprives the client of this authority is professional misconduct. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) & cmt. 5 (1983) ("the client may not be asked to agree . . . to surrender . . . the right to settle litigation that the lawyer might wish to continue."); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1986), Standard 4-5.2 (plea decision is for the client); *id.* at Standard 4-6.1 (lawyer for accused has duty to explore disposition without trial and to engage in plea negotiations with client's consent). *Cf.* Lewis v. S.S. Baune, 534 F.2d 1115, 1122 (5th Cir. 1976) (lawyer may not undertake civil representation conditioned on the client agreeing not to accept a settlement without the lawyer's consent).

Thus Lopez, who wanted to engage in plea negotiations, but yet desired to keep Tarlow as a lawyer in case the plea negotiations failed and the case went to trial, was placed in the impossible dilemma of having to waive his right to counsel in order to pursue plea negotiations. Lopez's lawyer made it clear that he would not undertake this activity, thus leaving his client unprotected in precisely the situation in which the protective policies of the anti-contact rule have the most forceful application. A broader view of ethics, premised on protection of clients more than lawyers and the ethical responsibility of the prosecutor as "a minister of justice and not simply [as] an advocate," MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. 1 (1983); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1986), Standard 3-1.1, would consider a communication that relieved the defendant from this dilemma as not only permissible but desirable.

by the contacts.[257] Nevertheless, the court refused to permit Lopez to waive the rule's protections because the rule protected his lawyer's effectiveness.[258] It stressed that the rule is designed to ensure that lawyers can function properly and to prevent communications that might "hamper [a lawyer's] subsequent performance."[259] But in *Lopez* the problem was caused by the defense lawyer's unwillingness to engage in steps desired by his client—plea bargaining with the prosecutor. Counsel sought to guarantee his "effectiveness" by refusing to undertake an essential defense function desired by his client. Courts simply should not apply the anti-contact rule to protect this kind of lawyer effectiveness.

Fourth, what rule governs the conduct of lawyers who operate in multiple jurisdictions? A related issue is what effect should a federal executive policy statement have in authorizing a federal lawyer's conduct, or in shaping a court's interpretation of an ethics rule? The prosecutor in *Lopez* practiced in the Northern District of California but was a member of the Arizona State Bar.[260] Under the Model Rule's approach, he remained subject to Arizona's jurisdiction even though he practiced in California, but if the rules in the two places differ, principles of conflict of laws may apply.[261] Although the anti-contact rule is in effect in nearly all jurisdictions, it is not interpreted uniformly. The *Lopez* court rejected an approach that would interpret its local rule, which adopted the California Bar's Rules of Professional Conduct, consistently with other federal case law in favor of adopting the state law interpretation of the rule. It also rejected the idea that the Attorney General has any authority to direct Justice Department lawyers' conduct inconsistently with federal court local rules. This is a complicated question requiring careful consideration of whether the conduct sought to be controlled is essentially investigatory, administrative, or litigatory; it should not be decided by cursory reference to the prosecutor as an officer of the court.[262] In any case, federal courts should strive for uniformity in matters of federal law.

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257. *Lopez*, 765 F. Supp. at 1451, 1462.

258. *Id.* at 1451-52.

259. *Id.* at 1449.

260. *See id.* at 1462 n.49.

261. MODEL RULE OF PROFESSIONAL CONDUCT Rule 8.5 and cmt. (1983). For discussion of choice of law considerations, see Duncan T. O'Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 SETON HALL L. REV 678 (1986).

262. *See* Beale, *supra* note 157 (arguing that courts lack general supervisory authority over prosecutors and investigators and concluding that the separation of powers principle limits judicial

A final question raised by *Lopez* is that of the rule's effect when asserted by a defendant as the basis for a claim of right in an adversarial proceeding. Should the rule be cognizable outside the disciplinary context? If so, what is the proper remedy for its violation? *Lopez* is the only case to dismiss an indictment in order to deter future violations of the anti-contact rule by federal prosecutors. Two prior cases went as far as authorizing exclusion of evidence as a means of implementing the anti-contact rule, but even then the courts refused to exclude the evidence in the cases at bar.[263] Dismissal is an extreme remedy, and should be reserved for law—not ethics—violations.[264]

F. Federalism Concerns

The application of state ethics rules to federal prosecutors acting in federal courts or before a federal grand jury may conflict with federal law. Because many federal courts adopt state ethics rules as local court rules, giving them the force of federal law, the Supremacy Clause is not greatly implicated in these conflicts.[265] What is affected is the uniform application of federal law. An illustration may clarify the problem.

Suppose a federal task force located in the District of Columbia is conducting a broad investigation into a possible conspiracy to make false claims against the government.[266] A federal lawyer admitted in

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control of executive branch lawyers).

263. United States v. Hammad, 858 F.2d 834, 837 (2d Cir. 1988) (holding prosecutor's use of a sham subpoena was egregious misconduct that could justify exclusion of informant's secret recording, but declining to exclude evidence in that case), *cert. denied*, 111 S. Ct. 192 (1990); United States v. Thomas, 474 F.2d 110 (10th Cir.) (holding that violation of anti-contact rule may justify exclusion of resulting evidence, but declining to exclude evidence in that case), *cert. denied*, 412 U.S. 932 (1973).

264. Because the prosecutor's actions caused no prejudice to Lopez, dismissal would have been unavailable as a remedy even if his actions violated the Sixth Amendment. *Lopez*, 765 F. Supp. at 1457; *see* Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). Thus *Lopez* produces the anomalous result of authorizing more severe sanctions for ethical violations than for constitutional ones. The Supreme Court has repeatedly admonished lower courts not to use the supervisory power in this manner. *See* United States v. Hasting, 461 U.S. 499 (1983) (supervisory power does not authorize court to reverse conviction in response to continuing misconduct of prosecutors where conduct was harmless error); United States v. Payner, 447 U.S. 727 (1980) (supervisory power does not authorize court to exclude evidence for misconduct where the defendant's Fourth Amendment rights were not violated); United States v. Russell, 411 U.S. 423, 435 (1973) (supervisory power does not give court a " 'chancellor's foot' veto over law enforcement practices of which it does not approve."). Thus, the *Lopez* decision is likely to be reversed on appeal.

265. *But see infra* notes 393-405 and accompanying text (Supremacy Clause is implicated by subpoena rule since fewer federal courts have adopted one).

266. A substantial number of federal lawyers are located in the District of Columbia, ad-

the District of Columbia, assisted by FBI personnel, plans to interview corporate employees in a number of states. The informal investigation is presumably centered at the federal agency's headquarters in Washington, D.C., but any effort to enforce an administrative summons or a subsequent grand jury subpoena will occur in the district court in which the particular employee resides. The corporations involved are aware of the investigation and, citing the anti-contact rule, take the position that since each corporation is represented by counsel in the matter, any contact with their thousands of employees without the consent and presence of their lawyers is prohibited.

The four jurisdictions in which the employees are located have differing versions of the anti-contact rule or interpret the rule differently. At one extreme is a jurisdiction that prohibits virtually all contacts with past or current employees of a represented corporation;[267] at the other is one that permits informal interviews with all employees except the handful of managers who control the corporation;[268] and the remaining jurisdictions fall into a middle ground in which interviews are permitted except with employees who can bind the corporation or whose actions will be imputed to it for purposes of liability.[269] The

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mitted to the District of Columbia bar, and carry out a substantial part of their activities within the District of Columbia. If they are employed by the Department of Justice, they are to use the Model Code as an ethical guide, but other standards and regulations impose much more specific requirements on a variety of matters, including the anti-contact rule and the issuance of subpoenas to lawyers. *E.g.*, U.S. ATTORNEY'S MANUAL § 9-2.161(a) (1985) (subpoena guidelines), *reprinted in In re* Grand Jury Subpoena to Attorney (Under Seal), 679 F. Supp. 1403, 1408 n.15 (N.D. W. Va. 1988); *see generally* 28 C.F.R. § 45 (1990) (standards of conduct).

267. Attorney General Thornburgh states that the Florida bar has interpreted its anti-contact rule to prohibit contact with all persons, not merely parties (thus prohibiting investigative contacts prior to indictment or arrest) and has eliminated the "authorized by law" exception. Thornburgh, *supra* note 85, at 291; *see also* Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs. Ltd., 745 F. Supp. 1037 (D.N.J. 1990) (whenever there is a "possibility" that the statement of a witness will be imputed to the corporation, informal contact is prohibited; the reference to "any other person" in the comment covers former employees); State v. CIBA-GEIGY Corp., 589 A.2d 180 (N.J. Super. Ct. 1991) (anti-contact rule bars informal contacts only with current employees who can bind the corporation).

268. *See, e.g.*, Fair Automotive Repair, Inc. v. Car-X Serv. Sys., Inc., 471 N.E.2d 554, 561 (Ill. App. Ct. 1984) (plaintiff's investigators in business tort case did not violate the anti-contact rule by posing as customers in defendant's automotive repair shop because the employees contacted were not within the "control group"). The D.C. Rules of Professional Conduct contain specific provisions dealing with a lawyer's communications with employees of organizations. An interview without the consent of the corporation's lawyer is permissible unless the individual is an officer of the corporation who can bind it, in effect limiting the bar against contact to officers who are part of the control group. *See* D.C. R.P.C. 4.2 cmt. (1991); *see also supra* notes 186, 196 and accompanying text.

269. Most states have adopted Model Rule 4.2, which itself is virtually indistinguishable

problem arising from the increasing lack of uniformity in state ethics rules is compounded by the adoption of differing sets of ethics rules as local rules by federal district courts.[270]

Which of these various sets of rules must the federal lawyer consider in conducting interviews concerning a single federal proceeding in various federal districts in four states having this spectrum of positions? Federal law provides authority for the fact-gathering activity.[271] Are there state or local interests that justify forcing federal law into conformity with the varying interpretations of the anti-contact rule by state ethics committees and state court decisions? The differing interpretations have more to do with creating barriers to the acquisition of information about corporations than they do with protecting the relationship between a corporation and its lawyer.[272]

An analogous situation involving a conflict between federal procedural law dealing with class actions has led to decisions holding that ethics rules, whether adopted by the district court as local rules or in their state form, are overridden by federal policy. In *Rand v. Monsanto*

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from the Code's DR 7-104(A)(1). Under this rule, if the gloss of a comment is taken seriously—a question on which decisions differ—the government would be prohibited from communicating with any employee of any of the target corporations "whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 cmt. 2 (1983).

270. In Illinois, for example, the Northern District of Illinois has adopted the 1980 version of the Model Code. Other districts in Illinois have adopted either the set of rules in effect in Illinois prior to its adoption of new rules, or the new rules. One district has failed to adopt any set of ethics rules. *See* Rand v. Monsanto Co., 926 F.2d 596, 600-03 (7th Cir. 1991) (discussing ethics rules adopted in local rules of various federal districts).

271. *See, e.g.*, United States v. Western Elec. Co., 1990-2 Trade Cas. (CCH) ¶ 69,148 (D.D.C. 1990) (allowing informal contacts with current employees of an organization under investigation pursuant to Antitrust Civil Process Act, 15 U.S.C. § 1311, *et seq.* (1988)).

272. The corporation's lawyer represents the entity, not the individual employees. *See supra* note 193. The problem is particularly acute in New Jersey where the judges within the same federal district disagree among themselves and with the state's view as to the interpretation of the anti-contact rule. *See* Walter Lucas, *ABA Ethics Unit Approves Ex-Employee Interviews*, N.J. L.J., Apr. 25, 1991, at 3; *compare supra* note 189 *and* United States v. CIBA-GEIGY Corp., 589 A.2d 180 (N.J. Super. Ct. 1991) (anti-contact rule bars informal contacts only with current employees who can bind the corporation). Yet the employees may be unwilling to talk with federal investigators in the presence of company lawyers, especially if the corporation has made it clear that it is not cooperating in the investigation. The whistle-blower protection provisions of several federal statutes provide protection to employees in some of these situations, another indication that important federal policies involving the flow of information are involved. *See supra* note 197 and accompanying text. For a good critique of expansive readings of the corporate attorney-client privilege, see DAVID J. LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 217-33 (1988).

Co.[273] the trial court relied on DR 5-103(B) of the Model Code, incorporated in a local rule, to refuse to certify the named plaintiff as an adequate representative of the class because he refused to assume responsibility for the costs to be advanced by his lawyer, as required by DR 5-103(B). In reversing, Judge Easterbrook stated:

> Whether the Northern District of Illinois changes its local rules to [eliminate the ethics rule] is in the end unimportant. Rule 23 [of the Federal Rules of Civil Procedure] is designed for the nation as a whole. Slavishly following the different state rules on the allocation of costs would balkanize litigation. . . . Rand could have filed this suit in six of the seven districts in the Seventh Circuit; only the Northern District of Illinois follows the Model Code. . . . We conclude that DR 5-103(B) is inconsistent with Rule 23 and therefore may not be applied to class actions.[274]

Two other cases have reached similar conclusions.[275] These examples illustrate how disuniformity in ethics rules can work unfairness to litigants and frustrate federal class action and discovery policies. Similar interests and policies argue for a uniform national approach in many situations involving the anti-contact and subpoena rules.

G. A Suggested Resolution

The vast disparity among judicial interpretations and applications of the anti-contact rule demonstrates the problems the rule poses to uniform and effective enforcement of federal law. Most troublesome is its inconsistency with the body of federal decisional law governing an accused's right to counsel. This body of law is designed to protect the same interests that are at the core of the anti-contact rule, but it does so with greater specificity and clarity. It is a body of law specifically crafted in order to ensure that an individual charged with crime has the protection of effective legal assistance and protection from undue governmental interference with the lawyer-client relationship.

Certainly, federal law in this area offers only minimal protection, and perhaps recent erosions of defendants' rights relating to counsel go

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273. 926 F.2d 596 (7th Cir. 1991).

274. *Id.* at 600.

275. *See* Woods v. New York Life Ins. Co., 686 F.2d 578 (7th Cir. 1982) (a lawyer who, with the approval of the district court, sent a notice to prospective members of a class in a Fair Labor Standards Act class action could not be punished by the state for stirring up litigation); County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1413-15 (E.D.N.Y. 1989) (federal court has discretion to depart from a state ethics rule; any effort by New York to enforce its ethics rule restricting lawyer financing of litigation to representatives of a class certified by a federal court would be barred by the Supremacy Clause of the United States Constitution).

too far. States are free to offer defendants more than the minimal protections afforded by federal law.[276] But use of state professional regulation to accomplish this result is improper. Such protections should come from statutory or constitutional law, subject to the democratic process—not through a code of ethics for lawyers. Ethics rules circumvent this process. More importantly, however, states may not impose their higher protections on federal courts. Whether or not the result is intentional, attempts to control the behavior of state bar members who are also federal lawyers may impermissibly inject state law into federal proceedings.

The differences between the bodies of law that have emerged regarding the constitutional right to counsel and the ethical prohibition on contact primarily concern two matters. First, the right-to-counsel protection comes into play only when a person is formally charged or in custody, leaving the pre-accusation stage free for investigatory contacts. Second, the accused may make a knowing and voluntary waiver of the constitutional right-to-counsel. Both differences involve central concerns of federal law: fact-gathering should not be impeded by restrictions on contacts occurring during the investigatory stage, which precedes formal proceedings; and information that is freely provided to federal officials should be admissible in federal law enforcement proceedings. The federal decisional law does not shield the lawyer-client relationship in order to ensure that the lawyer is in control of the flow of information; it responds to the interests and desires of clients in permitting informed consent to operate. The underlying objective of right-to-counsel law is to provide counsel if that is desired, but not to protect a suspect or accused from the consequences of his or her own candor. The right to the aid of a lawyer is a right of the accused, not an interest of lawyers that is preferred to the voluntary and informed desires of clients.

Federal right-to-counsel law is relevant in three different ways in passing upon a claim that a federal prosecutor has violated the anti-contact rule. First, right-to-counsel law suggests considerations of underlying policy that a court, exercising freedom in interpreting a rule of its own making, should read into the anti-contact rule. Second, this body of federal law may properly be viewed as authorizing certain contacts, thereby bringing those contacts within the "authorized by law"

276. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L REV. 489 (1977); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY L.J. 421 (1974).

language of the anti-contact rule. Third, a district court lacks power to formulate a prophylactic rule dealing with dismissal of criminal cases or exclusion of evidence that is inconsistent with this body of federal decisional law.

The result, we believe, is an interpretation and application of the anti-contact rule along the following lines. Courts should not view contacts of law enforcement personnel with a non-custodial criminal suspect prior to the commencement of formal charges as involving a party who is represented by a lawyer with respect to a specific subject of representation. Alternatively, investigatory contacts not involving overreaching may be viewed as authorized by law. After a charge is brought and the accused's right-to-counsel attaches, law enforcement personnel should not interview a represented defendant unless the defendant initiates the contact and makes a knowing and voluntary waiver of the presence of counsel; the prosecutor should seek court assistance before communicating with the defendant. An independent judicial determination, on the basis of an *in camera* meeting with the defendant, provides healthy reassurance that the waiver of counsel is knowing and voluntary.

IV. THE SUBPOENA RULE

The starkest and most striking arena of conflict between positive law and professional ethics, as viewed by many bar associations and other groups of lawyers, has been that of the issuance of subpoenas to lawyers. Lawyers may be subpoenaed in a variety of circumstances, of which the most common are the following:

* The attorney is subpoenaed to produce documents in her possession that are not protected from disclosure by her client's Fifth Amendment privilege against self-incrimination or by the attorney-client privilege.[277]

* The attorney is subpoenaed to testify regarding client conduct relating to allegations of perjury, obstruction of justice, conspiracy, or other criminal conduct,[278] or regarding her advice or assistance to a client

277. *See, e.g.*, United States v. Fisher, 425 U.S. 391 (1976) (preexisting business records not within client's self-incrimination and attorney-client privileges gain no further protection by being transferred to client's lawyer); *In re* Klein, 776 F.2d 628 (7th Cir. 1985) (business and financial records in attorney's possession have no blanket privilege against subpoena power).

278. *See, e.g.*, United States v. Morales-Martinez, 672 F. Supp. 762 (D. Vt. 1987) (communication between lawyer and client immediately before lawyer gave fraudulent passport to court sought as evidence of intentional use of false passport); *In re* Grand Jury Testimony of Attorney X, 621 F. Supp. 590 (E.D.N.Y. 1985) (conversations between attorney and client re-

relating to allegations of criminal or fraudulent conduct in which the attorney may have participated,[279] under circumstances in which the information sought is not shielded from disclosure by attorney-client privilege.[280]

* The attorney is subpoenaed to testify or produce documents relating to client identity and fee arrangements, as potential evidence that legal representation was provided by a benefactor for participation in a criminal enterprise to prove the existence of the criminal enterprise, or to provide information necessary to implement forfeiture, tax, or money laundering statutes.[281]

The first two situations are by no means novel; the latter is a product of legislation that spurred rapid growth in the number of subpoenas issued to lawyers in the early 1980s.[282] The criminal defense bar attacked this growing practice as an effort to undermine lawyer confidentiality, sow distrust between the defense lawyer and her client, and deprive the accused of counsel of choice.[283]

The defense bar was successful in enlisting the support of other bar associations, and ultimately the ABA, to vindicate the profession's

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garding grand jury investigation sought as evidence that client intentionally obstructed the investigation).

279. *See, e.g., In re* Sealed Case, 754 F.2d 395 (D.C. Cir. 1985) (government subpoenaed attorneys for grand jury investigation of obstruction of justice, conspiracy, and racketeering where attorneys had allegedly presented altered documents, false declarations and perjured testimony while representing the target).

280. Attorney-client communications are not privileged when the lawyer is consulted to further an existing or planned criminal or fraudulent scheme. *See In re* Berkley & Co., 629 F.2d 548, 553 (8th Cir. 1980); United States v. Friedman, 445 F.2d 1076, 1086 (9th Cir. 1971).

281. *See, e.g., In re* Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena, 913 F.2d 1118 (5th Cir. 1990) (benefactor payments), *cert. denied*, 111 S. Ct. 1581 (1991); *In re* Grand Jury Subpoenas (Anderson), 906 F.2d 1485 (10th Cir. 1990) (same); *In re* Grand Jury Subpoena Served Upon Doe (Slotnick), 781 F.2d 238 (2d Cir. 1985) (same), *cert. denied sub nom.* Roe v. United States, 475 U.S. 1108 (1986).

282. The forfeiture laws were strengthened in 1984, when cash reporting laws were also passed, and money laundering statutes were enacted in 1986. *See infra* notes 286-92 and accompanying text.

283. *See* William J. Genego, *Risky Business: The Hazards of Being a Criminal Defense Lawyer*, 1 CRIM. JUST. 2, 4 (Spring 1986) (stating that 21 percent of criminal defense lawyers surveyed reported receiving a government subpoena requesting information concerning the source of the lawyer's fee); Ellen R. Pierce & Lenard J. Colamarino, *Defense Counsel as a Witness for the Prosecution: Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Targets of Investigations*, 36 HASTINGS L.J. 821 (1985); Max D. Stern & David Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA L REV 1783 (1988); Robert C. Bonner, *A Balanced Perspective on Attorney Subpoenas*, 36 EMORY L J 803 (1987); Michael F. Orman, Note, *A Critical Appraisal of the Justice Department Guidelines for Grand Jury Subpoenas Issued to Defense Attorneys*, 1986 DUKE L.J 145.

normative vision of lawyering.[284] In this vision the commitment to client includes a degree of confidentiality that is not reflected in the state's positive law. This normative vision places the lawyer in the position of maintaining secrecy even when the client is engaged in ongoing crime or fraud. Protection of the client's constitutional rights (especially the right against self-incrimination and the right to counsel) is viewed as requiring a lawyer-client relationship in which the lawyer controls (and may often suppress) the flow of information to the state. The interests of third persons or the public who have been or may be injured by the client's actions are given little if any weight.

In one dimension the subpoena story is a shocking one: the use of a state forum in which the bar has special privileges and political influence to override longstanding principles of federal constitutional, substantive, and procedural law. Why, for example, should the ability of the Pennsylvania Bar Association to persuade the Supreme Court of Pennsylvania to adopt a special ethics rule requiring prior judicial approval of a subpoena addressed to a lawyer have the effect of displacing the constitutional authority of a federal grand jury to investigate crime? How can it be thought that longstanding federal decisional and procedural law sharply limiting the lawyer-client privilege in federal courts can be overridden by a state ethics rule expressing the profession's greater adherence to secrecy? Important issues of federalism, balkanization, and lack of uniformity in the application of federal law are implicated in the subpoena story.

This section first examines the rule's history and the impetus behind its adoption, which demonstrate concretely the conflicts between the vision of the law of lawyering held by professional organizations and that embodied in positive state and federal law. The section then analyzes several areas of positive law in which the law or its underlying policies conflict with the subpoena rule, and examines how courts have resolved these conflicts.

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284. *Cf.* United States v. Monsanto, 491 U.S. 600 (1989) (ABA challenging forfeiture of attorney fees); *Reyes-Requena*, 913 F.2d at 1121 n.3 (challenging attorney subpoenas were National Association of Criminal Defense Lawyers, Association of Trial Lawyers of America, Texas Criminal Defense Lawyers Association, and Harris County Criminal Lawyers Association); *Slotnick*, 781 F.2d 238 (challenging attorney subpoenas were New York Civil Liberties Union, New York Criminal Bar Association, National and New Jersey Associations of Criminal Defense Lawyers, and the bar associations of New York City and County).

A. History and Purpose of the Rule

A lawyer, like any other person, is and has always been subject to ordinary legal process, including compulsory production of documents and testimony. Attorney subpoenas were used only infrequently, however, until the early 1980s, when the stepped up federal battle on organized crime and narcotics led to rapid growth in the practice.[285] New racketeering[286] and narcotics[287] laws recognized legal representation provided by a benefactor in payment to participants in a conspiracy, as evidence of the benefactor's connection with the conspiracy.[288] New forfeiture laws enacted a "relation back" provision allowing the government to seize assets intended for, or paid to, a lawyer as legal fees.[289] New tax laws required attorneys to report the identities of clients who pay their fees with cash payments in excess of $10,000,[290] and new money-laundering laws criminalized certain monetary transactions, in-

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285. The developments are chronicled in a 1990 congressional report. *See* FEDERAL PROSECUTORIAL AUTHORITY IN A CHANGING LEGAL ENVIRONMENT: MORE ATTENTION REQUIRED, H.R. REP. NO. 986, 101st Cong., 2d Sess. 31 (1990).

286. *See* Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1988).

287. *See* Continuing Criminal Enterprise Act, 21 U.S.C. § 848 (1988).

288. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961(4) (1988); *see Slotnick*, 781 F.2d at 242.

289. *See* Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, 98 Stat. 2040 (codified as amended at 18 U.S.C. §§ 1961-68 (1988) and 21 U.S.C. §§ 853, 881 (1988)). The forfeiture act vests title to forfeitable assets in the United States upon commission of the acts giving rise to the forfeiture, preventing a defendant from transferring good title to anyone else unless the transferee is a bona fide purchaser for value lacking cause to believe the property was subject to forfeiture. *Id.* Under most circumstances, an attorney will generally have cause to believe the defendant's assets are subject to forfeiture before receiving payment, and the legal fees will be subject to forfeiture. *See Leading Cases*, 103 HARV. L. REV. 137 (1989); Wendy E. Kestin, Comment, *Attorney Fee Forfeitures Under the Comprehensive Forfeiture Act: Pulling the Plug on Organized Crime*, 38 EMORY L.J. 1223 (1989).

290. *See* Tax Reform Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (codified at 26 U.S.C. § 6050I (1988)) (requiring report identifying payor to IRS on receipt of cash exceeding $10,000 in a single or multiple related transactions). When the IRS sought to enforce the statute against lawyers, the criminal defense bar, supported by some state ethics opinions, organized a concerted campaign of non-reporting; thousands of attorneys routinely withheld identifying information. Fred Strasser, *Lawyers Must Name Names*, NAT'L L.J., June 24, 1991, at 18. According to an IRS official, "[o]nly 95 lawyers answered [enforcement] letters by providing client information." Alexander Stille, *A Strategic Retreat for the IRS on Disclosure of Attorney Fees*, NAT'L L.J., May 14, 1990, at 3. After the IRS issued 90 summonses to non-complying lawyers who had reported large or repeated case payments, *id.*, federal prosecutors brought a compliance action to test the government's contention that the reporting requirement was valid and that the requested information (client identity and fee information) was not privileged. The district court ordered compliance and the second circuit affirmed. United States v. Goldberger & Dubin, P.C., 935 F.2d 501 (2d Cir. 1991).

cluding simple bank deposits, involving the knowing use of funds derived from specified criminal activity.[291] As well as enacting enabling legislation, Congress also passed legislation urging the Justice Department to use aggressively any tools at its disposal.[292]

The defense bar, with the assistance of the ABA and other bars, resisted each of these laws, passing resolutions expressing its opposition.[293] Despite heavy lobbying efforts, the defense bar failed to win statutory exemptions to the forfeiture, cash reporting, and money-laundering laws for attorneys and attorney fees from either Congress or the courts.[294] Supported by the ABA, the National Association of Criminal Defense Lawyers, and others as *amici*, the defense bar challenged the forfeiture and cash reporting laws on statutory and constitutional grounds, but these challenges also failed.[295] Having failed in its direct attempts to prevent the application of these statutes to lawyers,[296] the bar sought to accomplish its objectives by other means. Subpoenas to attorneys are a primary means of enforcing these laws, seeking evi-

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291. Money Laundering Control Act of 1986, 100 Stat. 3207-18 (codified as amended at 18 U.S.C. §§ 1956-57 (1988)). The statute imposes criminal and civil penalties for knowing transactions designed to avoid reporting requirements or to conceal the source or ownership of proceeds. If a lawyer knows that the client's money comes from an illicit source, the lawyer commits a crime by depositing it in a bank. *See* Kathleen F. Brickey, *Tainted Assets and the Right to Counsel—The Money Laundering Conundrum*, 66 WASH. U. L.Q. 47 (1988).

292. The Justice Department Organized Crime and Drug Enforcement Enhancement Act of 1988 instructs the Department to give "appropriate weight to . . . the forfeiture and seizure of assets and other civil remedies" and to "give high priority to the enforcement of civil sanctions against drug networks and organized crime groups" and directs the Attorney General to "insure that [the Department of Justice] attaches a high priority to the enforcement of . . . forfeitures . . . ." Pub. L. No. 100-690, §§ 1052, 1054, 102 Stat. 4189 (codified at 28 U.S.C. § 509 note (1988)).

293. *See* 110 ABA ANN. REP. (1985); 111 ABA ANN. REP. (1986).

294. In *United States v. Monsanto*, the Supreme Court held that the forfeiture laws contain no exemption for assets used to pay attorney fees: "In enacting [the forfeiture laws], Congress decided to give force to the old adage that 'crime does not pay.' We find no evidence that Congress intended to modify that nostrum to read, 'crime does not pay, except for attorney's fees.'" United States v. Monsanto, 491 U.S. 600, 614 (1989).

The ABA was actively involved in the defense bar's resistance to cash reporting laws through lobbying of IRS and Justice Department officials, and amicus briefs in the test case. *See* Koniak, *supra* note 17 (manuscript at 30 n.66) (discussing bar support through amicus briefs, lobbying endeavors, and ethics opinions); *Goldberger & Dubin*, 935 F.2d at 504.

295. *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) (neither the right to counsel nor the due process clause forbid the government from subjecting assets intended for attorney fees to forfeiture); *Goldberger & Dubin*, 935 F.2d at 502, 504 (neither attorney-client privilege nor sixth amendment prohibit the government from requiring disclosure of identity of persons who pay legal fees with cash payments in excess of $10,000).

296. In *Goldberger*, Senior Judge VanGraafeiland rebuked the law firm for "seek[ing] to secure from the judiciary what their lobbyists were unable to get from Congress" and rejected the notion that state rules should affect the application of uniform federal law. *See id.* at 505.

dence where it is often uniquely located. By limiting subpoenas to attorneys, the bar may yet succeed in restricting investigations and prosecutions involving lawyers.

The bar first moved to restrict attorney subpoenas when the ABA adopted principles for grand jury reform legislation in 1977.[297] Concerned about the growing number of subpoenas issued to criminal defense lawyers,[298] the ABA suggested that "all stages of the grand jury proceedings should be conducted with proper consideration for the preservation of press freedom, attorney-client relationships, and comparable values."[299] In response to the bar's concerns, the Justice Department issued guidelines for subpoenaing lawyer witnesses; these guidelines largely tracked the bar's recommendations.[300] From the bar's

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297. *See Proceedings of 1977 Annual Meeting of the House of Delegates*, 102 ABA ANN REP. 516 (1977). The changed character of the ABA is reflected in its shifting attitude toward law enforcement authorities, particularly the Department of Justice, during the fifteen-year period over which the subpoena rule evolved. During the grand jury principle adoption process in 1977, all members of the committee that formulated the principles had prosecution backgrounds. *Id.* at 513. Although first put forth at the ABA's mid-year meeting, the principles were not considered by the House of Delegates until the annual meeting at the request of then-Attorney General Griffin Bell. *Id.* at 228. The Justice Department then worked closely with the committee in framing the principles. *Id.* at 893. Upon the Department's opposition to several principles, the House of Delegates amended one to gain Department support, and two—one which shifted the burden of proof from a witness wishing to quash a subpoena to the government, and one which allowed a motion to quash in jurisdictions other than where the grand jury was convened—were eliminated altogether. *Id.* at 512-16.

298. *Id.* at 902.

299. Principle 23, *id.* at 518. In 1980, the ABA added another grand jury principle, this time aimed directly at prosecutors: "No prosecutor shall call before the grand jury any witness who . . . intends to invoke the constitutional privilege against self-incrimination. . . ." *Proceedings of 1980 Annual Meeting of the House of Delegates*, 105 ABA ANN. REP. 648 (1980) (principle 26). This principle conflicts with well-settled law that a witness must appear and invoke the privilege against self-incrimination before the grand jury with respect to each answer he contends is privileged. *In re* Walsh, 623 F.2d 489 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980). This illustrates an occasion of the bar's attempt to alter positive law to conform to its vision of appropriate adversary conduct.

300. *Report of the Crim. Justice Section*, 110 ABA ANN. REP. (1985) (Criminal Justice Section mid-year informational report).

The Justice Department guidelines require a prosecutor to make every reasonable attempt to acquire information from other sources or from the attorney voluntarily before subpoenaing the attorney, and to obtain express authorization for the subpoena from the Assistant Attorney General of the Criminal Division. United States Attorney's Manual § 9-2.161(a) (1985), *reprinted in In re* Grand Jury Subpoena to Attorney (Under Seal), 679 F. Supp. 1403, 1408 n.15 (N.D. W. Va. 1988). Before approving a subpoena to an attorney, the Assistant Attorney General must find that the information sought is necessary for an investigation or prosecution, not peripheral or speculative; that all attempts to obtain the information from other sources were unsuccessful; that the need for the information outweighs any potential adverse effects on the attorney-client relationship, particularly considering the risk of attorney disqualification; that the subpoena is nar-

perspective, however, the guidelines had two shortcomings. First, they did not provide for approval of the subpoena by a neutral party; and second, they were not enforceable by third parties—an aggrieved person had no cause of action if the agency violated its own guidelines.[301] So, while the ABA proposed that the Justice Department change its guidelines, it began developing its own model guidelines.[302]

The ABA adopted a resolution in 1986 calling for prior judicial approval of subpoenas to lawyers concerning clients, to be withheld unless the court, in an *ex parte* hearing, made findings of relevancy and need.[303] The bar found this procedure unsatisfactory, however, because

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rowly drawn, limited as to time period and subject matter, and seeks material information; and that the information sought is not privileged. *Id.* The guidelines expressly state, however, that they do not affect the lawfulness of any subpoena issued and do not confer rights upon third parties, *id.*, and case law supports this assertion, *see In re* Grand Jury Subpoenas (Anderson), 906 F.2d 1485, 1496 (10th Cir. 1990); *In re* Klein, 776 F.2d 628, 635 (7th Cir. 1985); *cf.* United States v. Caceres, 440 U.S. 741 (1979).

301. *See supra* note 300.

302. 110 ABA ANN. REP. 957 (1985). This effort was undertaken by the Criminal Justice Section jointly with the Massachusetts Bar Association, which had just enacted its own subpoena guidelines in the form of a state ethics rule. 111 ABA ANN. REP. 23 (1986). The Massachusetts rule, as applied to federal litigators, was already under court challenge, where it was subsequently upheld by the district court and left intact by an equally-divided circuit court. *See* United States v. Klubock, 639 F. Supp. 117 (D. Mass. 1986), *aff'd*, 832 F.2d 664 (1st Cir. 1987) (en banc by an equally divided court); *infra* notes 325-33, 339 and accompanying text.

303. The resolution adopted by the House of Delegates provided:

> BE IT RESOLVED, That a prosecuting attorney shall not subpoena nor cause a subpoena to be issued to any attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness; and
>
> BE IT FURTHER RESOLVED, That prior judicial approval shall be withheld unless the court, in an *ex parte* hearing, finds:
>
> 1. the information sought is not protected from disclosure by the attorney-client privilege or the work product doctrine;
>
> 2. the evidence sought is relevant to an investigation within the jurisdiction of the grand jury;
>
> 3. the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and
>
> 4. there is no other feasible alternative to obtain the information sought; and
>
> BE IT FURTHER RESOLVED, That the *ex parte* hearing seeking judicial approval shall be conducted with consideration for the need for the secrecy of grand jury proceedings. The hearing shall be conducted by a judge of a court of general jurisdiction, and, wherever feasible, by the judge supervising the grand jury in question; and
>
> BE IT FURTHER RESOLVED, That no affirmative finding in the *ex parte* proceeding shall have any evidentiary value in any subsequent adversarial proceeding to determine the validity or enforcement of the subpoena; and
>
> BE IT FURTHER RESOLVED, That the American Bar Association urges that these principles be implemented by state and federal authorities through appropriate means such as rules of court, statutes, and case law.

it provided "no check on the overzealous prosecutor who . . . overstated the factual basis for the request" and "lead the reviewing court to serve as a 'rubber stamp' for the prosecutor."[304] Accordingly, the ABA modified the resolution in 1988 to require an adversary hearing, rather than an *ex parte* hearing.[305] In 1990, after the federal practice of subpoenaing attorneys had continued unabated, the ABA adopted an amendment to the Model Rules, creating an ethical prohibition against sub-

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111 ABA ANN. REP. D-1 (1986).

304. ABA Standing Committee on Ethics and Prof. Responsibility and Crim. Justice Section Report to the House of Delegates 4 (1990).

305. The 1988 ABA resolution follows, with significant additions to the 1986 version indicated by italics and deletions indicated by brackets.

> BE IT RESOLVED, That where a prosecutor seeks to compel an attorney to provide evidence *obtained as a result of the attorney-client relationship* concerning a person who is *or was* represented by the attorney, the prosecutor shall not subpoena nor cause a subpoena to be issued to the attorney [to a grand jury] without prior judicial approval *after an opportunity for an adversarial proceeding*; and
>
> BE IT FURTHER RESOLVED, That prior judicial approval shall be withheld unless the court [, in an ex parte hearing,] finds, *on reasonable notice to the attorney and the client*:
>
> 1. the information sought is not protected from disclosure by *any applicable* [the attorney-client] privilege [or the work product doctrine];
>
> 2. the evidence sought is [relevant to] *essential to the successful completion of an ongoing* investigation [within the jurisdiction of the grand jury] *or prosecution and is not merely peripheral, cumulative or speculative*;
>
> 3. *the subpoena lists the information sought with particularity, is directed at information regarding a limited subject matter and a reasonably limited period of time and gives reasonable and timely notice*;
>
> 4. the purpose of the subpoena is not [primarily] to harass the attorney or his or her client; and
>
> 5. *the prosecutor has unsuccessfully made all reasonable attempts to obtain the information sought from non-attorney sources and* there is no other feasible alternative to obtain the information [sought].
>
> BE IT FURTHER RESOLVED, *That at the hearing, the prosecutor seeking to subpoena information as defined above, must submit to the appropriate court an affidavit making a particularized showing of the facts establishing all of the requirements specified above. The affidavit shall be disclosed to the attorney and the client. However, upon a special showing of compelling need, the affidavit may be maintained as an ex parte affidavit until such time as the need for secrecy is no longer compelling; and*
>
> BE IT FURTHER RESOLVED, That *any* [the ex parte] hearing seeking judicial approval for a grand jury subpoena shall be conducted with consideration for the need for secrecy [of grand jury proceedings]; and
>
> [. . . no affirmative finding in the ex parte proceeding shall have any evidentiary value in any subsequent adversarial proceeding . . .]
>
> BE IT FURTHER RESOLVED, That the American Bar Association urges that these principles be implemented by state and federal authorities through appropriate means such as rules of court, statutes, and case law.

Resolution of the House of Delegates (Feb. 1988).

poenaing a lawyer/witness without a showing of need, an adversary hearing, and prior judicial approval.[306]

The rule's stated purpose is to limit lawyer subpoenas to "situations in which there is a genuine need to intrude into the client-lawyer relationship."[307] It is this relationship, and not merely the attorney-client privilege, that is the object of the bar's concern. In support of its advocacy of greater protection for attorney-client relationships, it advances several arguments. First is simply the need for an enhanced safeguard for attorney-client privilege: complexities in the law of privilege and its application make any occasion for attorney-witnessing an opportunity for unintentional waivers and disclosures of privileged information that might not occur otherwise.[308]

There is also the need to accommodate a lawyer's ethical duties. A lawyer entertains many client confidences that she is ethically prohibited from revealing, even though the information may be unprivileged; she should be protected from being forced to violate legal ethics.[309] Also, requiring a lawyer to testify creates a conflict of interest between the lawyer and client; the lawyer must either testify against her client's best interests or face contempt charges, and may be forced to withdraw or be disqualified from the case, both of which harm the client's right

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306. The ABA House of Delegates added the subpoena rule to the Model Rules of Professional Conduct in February, 1990. The subpoena rule provides:

> The prosecutor in a criminal case shall: . . .
>
> (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:
>
> (1) the prosecutor reasonably believes:
>
> (a) the information sought is not protected from disclosure by any applicable privilege;
>
> (b) the evidence sought is essential to the successful completion of an on-going investigation or prosecution;
>
> (c) there is no other feasible alternative to obtain the information; and
>
> (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(f), *reprinted in* 6 Laws. Man. on Prof. Conduct (ABA/BNA) 25, 26 (Feb. 28, 1990). The rule omits the resolution's requirement that judicial approval be withheld unless certain findings are made, as well as the earlier requirements that the subpoena not be unreasonably broad and that the prosecutor have unsuccessfully attempted to obtain the information from all other sources and submit an affidavit making a particularized showing of need.

307. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(f) cmt. (1990).

308. *See In re* Grand Jury Proceedings (Weiner), 754 F.2d 154, 156 (6th Cir. 1985) (acknowledging risk that attorney may unwittingly waive a client's privilege).

309. *See In re* Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1009 n.4, *dismissed as moot*, 697 F.2d 112 (4th Cir. 1982).

to effective assistance of counsel.[310] Furthermore, the argument runs, regardless how insignificant the information provided by an attorney, clients may find the appearance of their attorneys' compelled cooperation with the adversary unsettling and destructive of client trust and confidence in the attorney.[311]

Finally, the prospect of exposing oneself to disqualification from the representation or to investigation by a grand jury by becoming a witness may discourage a lawyer from undertaking a representation, imposing constraints on defendants' abilities to obtain representation.[312] This latter problem may affect a defendant individually, limiting his ability to retain counsel of choice due to disqualification of counsel for conflicts of interest. It also may affect defendants as a class, limiting their ability to find counsel due to a shrinking pool of competent defense counsel willing to risk the witness stand.[313]

Beyond the protections offered to communications subject to the attorney-client privilege and the right-to-counsel law previously discussed, positive law contains no broad protections for the attorney-client relationship. The Supreme Court flatly rejected the notion that the Sixth Amendment's guarantee of assistance of counsel includes a right to a "meaningful attorney-client relationship."[314] And where ethical duties conflict with law, the Court has not been sympathetic to claims that the law should accommodate the profession.[315] In particular, federal courts have consistently and almost unanimously rejected claims and privileges against the use of attorney subpoenas advanced by the

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310. *In re* Grand Jury Subpoenas (Anderson), 906 F.2d 1485, 1493 (10th Cir. 1990).

311. *See In re* Grand Jury Subpoena Served Upon Doe (Slotnick), 781 F.2d 238, 260 (2d Cir. 1985) (Cardamone, J., dissenting) (en banc), *cert. denied sub nom.* Roe v. United States, 475 U.S. 1108 (1986); *In re* Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 945-46 (E.D. Pa. 1976).

312. *In re* Grand Jury Matters, 593 F. Supp. 103, 107 (D.N.H. 1984), *aff'd sub nom.* United States v. Hodes, 751 F.2d 13 (1st Cir. 1985).

313. Genego, *supra* note 283; William J. Genego, *The New Adversary*, 54 BROOK. L REV. 781 (1988).

314. Morris v. Slappy, 461 U.S. 1, 13 (1983) (reversing grant of habeas corpus where court of appeals had based relief on defendant's lack of rapport with his lawyers; the Supreme Court held that the lower court's conclusion that "the Sixth Amendment right to counsel 'would be without substance if it did not include the right to a *meaningful attorney-client relationship*' (emphasis added) is without basis in the law.") (citation omitted).

315. *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 632 n.10 (1989) (rejecting possible ethical conflicts created for lawyers as a reason for invalidating a forfeiture statute as applied to attorney fees); *cf.* United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 504 (2d Cir. 1991) (rejecting effect on attorney-client privilege and potential incrimination of clients as a reason for holding lawyers exempt from I.R.S. cash reporting requirements).

criminal defense bar. In case after case courts ruled that, among other things: federal grand jury subpoenas may be directed to lawyers as well as other persons; special subpoena procedures applicable only to lawyers, such as a prior judicial hearing, are unnecessary; the government need not demonstrate a higher threshold of relevancy or need for information sought from an attorney; the attorney-client privilege generally does not include information concerning client identity or fee arrangements; and the crime-fraud exception to the attorney-client privilege permits a prosecutor to seek testimony or documents concerning a client's communication to the lawyer or the lawyer's advice.[316]

No federal appellate court has found a right to require the government to make a preliminary showing of need or lack of alternative sources for information sought by an attorney subpoena.[317] Few of these courts were faced, however, with the existence of a state ethics rule restricting attorney subpoenas and limiting the information that may be sought.[318] Nor did the courts address the question of their authority to require such a showing. Nonetheless, these rulings raise significant questions as to the validity and effect of such a state rule.

B. Validity of a State Ethics Rule

To date, only a few states have adopted a subpoena rule.[319] Several states, including the important jurisdictions of New York, Illinois and

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316. *See infra* notes 344-92 and accompanying text.

317. *In re* Grand Jury Subpoenas (Anderson), 906 F.2d 1485, 1496 (10th Cir. 1990).

318. Four federal district courts have squarely faced the issue of the applicability of a state ethical rule regulating attorney subpoenas in federal proceedings. One federal district court first upheld the state subpoena rule and then adopted it as its own rule, *see* United States v. Klubock, 832 F.2d 649 (1st Cir. 1986) (federal district court for the District of Massachusetts adopted state subpoena rule as local federal rule), *vacated but incorporated by reference*, 832 F.2d 664, 665 (1st Cir. 1987) (en banc by an equally divided court), and three attempted—with mixed success—not to follow the state rule. *See* Baylson v. Disciplinary Bd. of the Supreme Court of Pa., 764 F. Supp. 328 (E.D. Pa. 1991) (holding invalid rules adopted by the three federal district courts of Pennsylvania nullifying a state subpoena rule, for lack of compliance with notice and comment requirements, but also holding the state rule inapplicable to attorneys in federal proceedings on other grounds). The Disciplinary Board argued that the federal rules disclaiming the subpoena rule were invalid for lack of notice and comment, and that because the federal district rules incorporated the state's rules as amended from time to time, the federal rules thus adopted the state subpoena rule—even though the result was a "more imposing and far-reaching alteration of practice," likewise accomplished without notice and comment. *Id.* at 338.

319. *See* MASS SUP JUD. CT. R. 3:08 PF 15; N.H. R.P.C. 4.5; PA. R.P.C. 3.10; R I. SUP. CT. R 47 Rule 3.8(f); TENN SUP. CT R 8 DR 7-103(C); and VA. SUP. CT. R. 3A:12 (rule of court procedure, not ethics).

the District of Columbia, have considered and rejected it.[320] The premise of state regulation of the practice of law is that lawyers employed by the federal government are bound by state ethics rules in the jurisdictions in which they are admitted or practice, or both.[321] In the jurisdictions in which a subpoena rule is in effect, then, a federal prosecutor arguably must comply with it. Therefore, although federal rules in the jurisdiction may lack a similar provision, a federal prosecutor must ask the federal court to meet the procedural requirements of the state subpoena rule, including conducting a hearing, and the prosecutor must make the requisite showing before he may serve a subpoena upon an attorney.

If the prosecutor fails to comply with the ethics rule, his conduct may be challenged in a disciplinary action. More likely, however, the subpoenaed attorney, or her client,[322] will raise the breach of ethics as grounds for quashing the subpoena.[323] Alternatively, an attorney may use the ethics violation as the basis for a claim of prosecutorial misconduct, seeking to: (1) exclude from trial any evidence obtained thereby; (2) reverse a conviction obtained through the use of such evidence or as a result of the subpoenaed attorney's disqualification from the case; or (3) dismiss an indictment resulting from any evidence obtained from the subpoenaed attorney.[324]

The two federal courts that have addressed the validity of state subpoena rules as applied to federal attorneys reached opposing conclusions. In *United States v. Klubock*,[325] federal prosecutors brought a de-

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320. *See* 6 Laws. Man. on Prof. Conduct (ABA/BNA) 28, 29 (Feb. 28, 1990) (Illinois rejected rule); *id.* at 53, 55 (Mar. 14, 1990) (District of Columbia rejected rule); *id.* at 172, 175 (June 6, 1990) (New York rejected rule).

321. *See supra* notes 101-02 and accompanying text.

322. When an attorney is subpoenaed, a person claiming the right to suppress information under a claim of attorney-client privilege may intervene to assert the privilege and to appeal a rejection of the assertion. *See* Perlman v. United States, 247 U.S. 7 (1918); *In re* Grand Jury Proceedings (Freeman), 708 F.2d 1571, 1574-75 (11th Cir. 1983) (per curiam).

323. Ethical grounds were raised (and rejected) as a basis for quashing subpoenas to attorneys in *In re* Grand Jury Subpoenas (Anderson), 906 F.2d 1485 (10th Cir. 1990); *In re* Grand Jury Subpoena Served Upon Doe (Slotnick), 781 F.2d 238 (2d Cir. 1985) (en banc), *cert. denied sub nom.* Roe v. United States, 475 U.S. 1108 (1986); *In re* Grand Jury Subpoena For Attorney Representing Criminal Defendant Reyes-Requena, 724 F. Supp. 458 (S.D. Tex. 1989), *rev'd*, 913 F.2d 1118 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1581 (1991).

324. *Cf. In re* Klein, 776 F.2d 628, 634 (7th Cir. 1985) (if attorney appearance does prejudice right to counsel, may dismiss indictment or reverse conviction); *Slotnick*, 781 F.2d at 258 (Cardamone, J., dissenting) (en banc) (attorney appearance and disqualification may be prejudicial deprivation of counsel too irreparable to cure with exclusionary rule).

325. 639 F. Supp. 117 (D. Mass.), *aff'd*, 832 F.2d 649 (1st Cir. 1986), *vacated*, 832 F.2d 664 (1st Cir. 1987) (en banc by an equally divided court).

claratory judgment action against the Massachusetts Board of Bar Overseers to invalidate PF 15, a state ethics rule making it unprofessional conduct for a prosecutor to subpoena an attorney without prior judicial approval.[326] The plaintiffs contended that PF 15 conflicts with the letter and spirit of Rule 17 of the Federal Rules of Criminal Procedure and the federal grand jury policies it implements,[327] rendering the state rule invalid (as applied to federal prosecutors) under the Supremacy Clause.[328]

The district court found that PF 15 presented no actual conflict with federal law, so federal law did not supersede state law.[329] PF 15 neither deprives a grand jury of evidence, nor impedes its investigations, the court held, so it does not frustrate federal policy. The court also rejected the claim that the rule interfered with federal officers in the execution of their duties, since, it stated, regulating attorneys is a proper exercise of state power.[330] Pending appeal, the federal district court explicitly adopted PF 15 as a federal court rule.[331] The controversy on appeal thus was limited to the validity of the federal court rule. On rehearing *en banc*, the circuit court did not consider the Supremacy Clause question, and divided on the validity of the federal

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326. "It is unprofessional conduct for a prosecutor to subpoena an attorney to a grand jury without prior judicial approval in circumstances where the prosecutor seeks to compel the attorney/witness to provide evidence concerning a person who is represented by the attorney/witness." *Id.* at 118 (citing MASS SUP. JUD. CT. R. 3:08 PF 15).

327. *Id.* at 121. "A subpoena *shall be issued* by the clerk . . . The clerk *shall issue* a subpoena . . . to a party requesting it . . ." FED. R. CRIM. P. 17(a) (emphasis added).

328. Plaintiffs also challenged PF 15 as a federal rule, because local federal court rules seemingly incorporated PF 15 by reference, providing for discipline for violations of the Code of Professional Responsibility as "adopted by the highest court of the state, or commonwealth, as amended from time to time by that court." 639 F. Supp. at 119 n.3 (construing D. Mass. Local R. 5(d)(4)(B)). The alleged conflict between Rule 17 and PF 15 invalidated PF 15 as a local federal rule under Rule 57 of the Federal Rules of Criminal Procedure, which permits local rules "not inconsistent with these rules." FED. R. CRIM. P. 57.

329.

> Plaintiffs have construed PF 15 to require judicial approval before *issuance* of a subpoena by the clerk . . . But a prosecutor can still pick up a blank subpoena from the court, fill it in as permitted under Rule 17(a), and *then* seek court approval. . . By its terms, PF 15 simply requires approval at some time prior to *service.*

639 F. Supp. at 120 n.8 (emphasis added). "Thus, PF 15 and Rule 17(a) peacefully coexist." *Id.* at 122.

330. *Id.* at 125-26.

331. United States v. Klubock, 832 F.2d 649, 650 (1st Cir. 1986), *vacated*, 832 F.2d 664 (1st Cir. 1987) (en banc by an equally divided court).

court rule.[332] The affirmance by an equally divided court left the district court's ruling intact, but dissipated its authoritativeness.[333]

In *Baylson v. Disciplinary Board of the Supreme Court of Pennsylvania*, federal prosecutors challenged Pennsylvania's newly-adopted subpoena rule, Rule 3.10.[334] The federal district courts of Pennsylvania had all enacted local rules specifically excepting Rule 3.10 from federal rules that otherwise incorporated the state's ethics rules as rules of their courts. Federal prosecutors sought a declaratory judgment to prevent the state disciplinary board from enforcing the state rule against federal prosecutors, on the basis of the Supremacy Clause and other constitutional grounds.[335] Although the court found the federal local rules excluding Rule 3.10 from incorporation to be invalid because adopted without proper notice and comment procedures, it held that the Supremacy Clause barred the Disciplinary Board from enforcing Rule 3.10 against attorneys practicing in federal court because the rule conflicted with federal law. Not only did the rule impose restraints on courts and grand juries as well as attorneys, it conflicted with the requirement of secrecy as to grand jury matters stated in Federal Rule of Criminal Procedure 6(e), expanded the scope of attorney-client privilege, and conflicted with the procedures specified in Federal Rule of Criminal Procedure 17.

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332. 832 F.2d at 667 (incorporating by reference 832 F.2d at 651-52).

333. Decisions of an equally divided court have no weight as precedent. CHARLES A WRIGHT, THE LAW OF FEDERAL COURTS 758 (4th ed. 1983).

334.

> A public prosecutor or other governmental lawyer shall not, without prior judicial approval, subpoena an attorney to appear before a grand jury or other tribunal investigating criminal activity in circumstances where the prosecutor or other governmental lawyer seeks to compel the attorney/witness to provide evidence concerning a person who is or has been represented by the attorney/witness.

PA. R.P.C. 3.10 (1988). The comment to the rule states:

> It is intended that the required "prior judicial approval" will normally be withheld unless, after a hearing conducted with due regard for the need for appropriate secrecy, the court finds (1) the information sought is not protected from disclosure by Rule 1.6 (concerning confidentiality of information), the attorney-client privilege or the work product doctrine; (2) the evidence sought is relevant to the proceeding; (3) compliance with the subpoena would not be unreasonable or oppressive; (4) the purpose of the subpoena is not primarily to harass the attorney/witness or his or her client; and (5) there is no other feasible alternative to obtain the information sought.

Id., *reprinted in Baylson*, 764 F. Supp. 328, 331 (E.D. Pa. 1991).

335. The plaintiffs argued that the Supremacy Clause rendered Rule 3.10 invalid because of the federal local rules rejecting it; that the rule conflicted with the Federal Rules of Criminal Procedure; and that it interfered with executive branch investigatory and law enforcement duties and judicial supervisory duties. *Baylson*, 764 F. Supp. at 332.

The texts of the subpoena rules at issue in the two cases are nearly identical, but the comments to them indicate that they are different in important respects.[336] Pennsylvania's Rule 3.10 incorporates five standards to guide a court in determining whether to approve a subpoena, while the Massachusetts rule contains no standards.[337] Rule 3.10 extends a prohibition to subpoenas seeking not merely privileged information, but the vastly broader category of information as to which a lawyer has a duty of confidentiality. It also specifically places the burden on the prosecutor to make his case, contemplating that a court will otherwise withhold approval. These differences may explain the dramatically different views offered of the Federal Rules of Criminal Procedure, of federal judicial supervisory authority, and ultimately of the validity of the two subpoena rules.

The *Baylson* court viewed the Federal Rules of Criminal Procedure as expressions of policy, to be read in light of each other as well as related decisional law. The court then considered judicial rulemaking authority in the shadow cast by these principles. So, for example, the court weighed the longstanding policy of grand jury secrecy expressed in Rule 6(e), examined the interests furthered by that policy and considered the effect of the subpoena rule on those interests.[338] It analyzed the subpoena rule's procedural and substantive constraints on a grand jury's powers, noting the broad latitude accorded the grand jury in federal case law. It considered the law of other circuits declining to permit the imposition of conditions on grand jury subpoenas, the subpoena rule's *de facto* expansion of attorney-client privilege, and the subpoena procedures established by Rule 17. Concluding that the subpoena rule offends federal law, the court held that the Supremacy Clause barred the Disciplinary Board from enforcing the state ethics rule against attorneys practicing in federal fora.

The *Klubock* court, on the other hand, broadly construed its supervisory powers and treated the Federal Rules of Criminal Procedure

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336. This aspect of the two state rules demonstrates the troubling problem of lack of uniformity among ethics rules. The problem is not merely one of different rules of conduct, a problem at least readily apparent to attorneys who must conform to the rules; the problem here is textually similar rules urging differing interpretations. The potential for confusion and uncertainty in the law is significant, as cases interpreting and applying the "same" rules develop into distinct bodies of law and attorneys spar over which should apply.

337. *Klubock*, 639 F. Supp. at 120 n.7 (the Massachusetts Bar Association proposed standards in its version of the rule, but the Supreme Judicial Court declined to adopt them and deleted them from the rule finally promulgated).

338. *Baylson*, 764 F. Supp. at 339-40.

as mechanical provisions supplementing the court's exercise of its own supervisory powers.[339] Citing its authority to control grand jury *abuse* and *excesses*, it believed its supervisory powers to be limited only by a prohibition on arbitrariness and on the creation or expansion of privilege. Concluding that the subpoena rule affected only service of subpoenas and not issuance, the court determined that the rule did not create or expand privilege and was therefore well within its supervisory power. It held that there was no conflict with federal policy, considering only the grand jury's right to evidence and the policy against procedural delays. As to evidence, the rule's effect was to bar evidence the court could have barred anyway; as to delay, the government failed to prove that the subpoena showing required would cause any delay.

Klubock shows that a case can be made for the validity of a state subpoena rule, despite the fact that it alters federal procedures. But federal case law on matters affected by such an ethics rule show that the case against it is much stronger. Every federal circuit except the First[340] has rejected claims that the government must make a preliminary showing of need and take other steps that a subpoena rule would mandate.[341] The Constitution does not require such a showing,[342] and federal decisional law concerning grand juries and federal rules of procedure may preclude a court from imposing such a requirement through local rules.[343]

1. The Right to Assistance of Counsel

The constitutional guarantee of assistance of counsel does not prohibit the government from compelling a lawyer to serve as a witness.[344]

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339. *See Klubock*, 639 F. Supp. at 119-20, 122.

340. The First Circuit Court of Appeals split 3-3 on the issue, *see* United States v. Klubock, 832 F.2d 664 (1st Cir. 1987) (en banc), with the result that the lower court's decision approving the rule is left intact but stripped of precedent value. *See supra* note 333.

341. *Baylson*, 764 F. Supp. 343-44 (citing cases); Stern & Hoffman, *supra* note 283, at 1809 & n.120 (citing cases). The Third and Tenth Circuits have since joined the majority in rejecting a preliminary showing of need prior to subpoenaing an attorney. *See In re* Grand Jury Matter (Backiel), 906 F.2d 78 (3d Cir.), *cert. denied*, 111 S. Ct. 509 (1990); *In re* Grand Jury Subpoenas (Anderson), 906 F.2d 1485 (10th Cir. 1990).

342. *See infra* notes 344-58 and accompanying text.

343. *See* FED. R. CRIM. P. 6, 17, 57, discussed *infra* notes 382-92 and accompanying text.

344. *In re* Grand Jury Matter (John Doe 1), 926 F.2d 348 (4th Cir. 1991); *In re* Grand Jury Subpoena For Attorney Representing Criminal Defendant Reyes-Requena, 913 F.2d 1118 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1581 (1991); *In re* Grand Jury Subpoenas (Anderson), 906 F.2d 1485 (10th Cir. 1990); *In re* Klein, 776 F.2d 628 (7th Cir. 1985); *In re* Grand Jury Subpoena Served Upon Doe (Slotnick), 781 F.2d 238 (2d Cir. 1985) (en banc), *cert. denied sub nom.* Roe v. United States, 475 U.S. 1108 (1986).

Moreover, if no constitutionally protected interest is concerned, there is no basis for requiring the government to make a preliminary showing of need.[345] The Sixth Amendment carries a "presumption" in favor of counsel of choice, particularly where counsel is retained rather than appointed.[346] Because subpoenaing an attorney may eventually lead to disqualification of the attorney from the representation, or may otherwise disrupt the lawyer-client relationship, the practice poses a threat to a defendant's presumptive right to the assistance of counsel of choice. The Sixth Amendment's protections, however, attach only after criminal proceedings are initiated. Because a grand jury target's right to counsel has not yet attached, his interest in representation by a particular attorney is not constitutionally protected.[347] Although it may be weighed in the decision whether to quash or enforce a grand jury subpoena, the government's interest in preserving investigatory flexibility and secrecy and avoiding procedural delays dictates that "in the grand jury context the law enforcement interest will almost always prevail."[348]

Even when the constitutional guarantee is applicable, it does not automatically shield an attorney from her obligation to serve as a witness. A defendant's right to particular counsel is not absolute. One circuit holds that it provides no grounds to resist a subpoena.[349] Other circuits weigh a defendant's right to counsel of choice against the probative value of the information sought[350] or the tribunal's right to evidence.[351] Only where a subpoena will actually result in disqualification

345. *Slotnick*, 781 F.2d at 244 (citing United States v. Dionisio, 410 U.S. 1, 16 (1973)).

346. Wheat v. United States, 486 U.S. 153 (1988).

347. *Slotnick*, 781 F.2d at 243-44.

348. United States v. R. Enterprises, 111 S. Ct. 722 (1991) (Stevens, J., concurring); *cf.* Wheat v. United States, 486 U.S. 153 (1988) (holding that Sixth Amendment right to choose one's own counsel may be overridden by institutional interests in administration of justice, allowing courts to refuse to allow defendant's chosen counsel to represent him where court finds potential conflict of interest).

349. *In re* Klein, 776 F.2d at 634 ("Concern about the possible effects of disclosure on legal representation at trial is not a reason—apart from the extent to which it is reflected in the privilege—to resist disclosure.").

350. *Slotnick*, 781 F.2d at 250-51.

351. *In re* Grand Jury Matter (John Doe 1), 926 F.2d 348, 350 (4th Cir. 1991) (showing of actual conflict and thus certainty of disqualification required to outweigh obligation to give evidence before the grand jury); *In re* Grand Jury Subpoena For Attorney Representing Criminal Defendant Reyes-Requena, 913 F.2d 1118, 1129-30 (5th Cir. 1990) (same), *cert. denied*, 111 S. Ct. 1581 (1991); United States v. Perry, 857 F.2d 1346 (9th Cir. 1988) (requiring case by case analysis of prejudice).

of the lawyer does it violate a defendant's right to counsel,[352] and disqualification is not inevitable, nor even probable, following compliance with a subpoena.[353]

> Before disqualification can even be contemplated, the attorney's testimony must incriminate his client; the grand jury must indict; the government must go forward with the prosecution of the indictment; and ultimately, the attorney must be advised that he will be called as a trial witness against his client.[354]

Even then the information sought may be presented without the attorney's testimony, or may be excluded as more prejudicial than probative.[355] Finally, the decision to disqualify rests with the court, which has ample power to resist any attempt to "manufacture" a conflict of interest.[356]

Moreover, protection for a defendant's right to counsel already exists in federal practice in Rule 17(c) of the Federal Rules of Criminal Procedure. Under Rule 17(c), which permits a court to quash a subpoena on motion by the attorney or client-intervenor "if compliance would be unreasonable or oppressive,"[357] a court will refuse to enforce a subpoena that is harassing or that interferes with counsel's preparation for trial.[358] Given the existence of this safeguard and the procedure it specifies, there is no constitutional justification, much less authority, for fashioning additional procedures or substantive grounds for relief.

2. *Attorney-Client Privilege*

The attorney-client privilege neither prevents the government from subpoenaing an attorney, nor requires that special circumstances be shown in order to do so. The claim of attorney-client privilege has been litigated repeatedly in the context of attorney subpoenas, and several clear propositions have emerged. First, the existence of a privilege against disclosure protects only confidential communications, not the

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352. *In re* Grand Jury Subpoena (Anderson), 906 F.2d 1485, 1494 (10th Cir. 1990).

353. *Klein*, 776 F.2d at 633; *accord Reyes-Requena*, 913 F.2d 1118; *In re* Grand Jury Subpoenas (Anderson), 906 F.2d 1485, 1494-95 (10th Cir. 1990); *Perry*, 857 F.2d at 1350; *In re* Grand Jury Subpoena Served Upon Doe (Slotnick), 781 F.2d 238 (2d Cir. 1985) (en banc), *cert. denied sub nom.* Roe v. United States, 475 U.S. 1108 (1986).

354. *Slotnick*, 781 F.2d at 245.

355. *Id.*

356. Wheat v. United States, 486 U.S. 153 (1988); *In re* Klein, 776 F.2d 628 (7th Cir. 1985).

357. FED. R. CRIM. P. 17(c).

358. *Reyes-Requena*, 913 F.2d at 1130; *Anderson*, 906 F.2d at 1494-95; *Slotnick*, 781 F.2d at 250-51 & n.7; *In re* Grand Jury Matters, 751 F.2d 13 (1st Cir. 1984).

attorney-client relationship as a whole.[359] Thus, attorneys have no blanket exemption from the duty to appear before the grand jury.[360] Such an exemption would expand the bounds of the attorney-client privilege.[361] An attorney may refuse to reveal information that is privileged, but to do so she must appear before the tribunal, assert the privilege, and submit to judicial determination of the merits of the claim.[362] Recognition of these principles were in part the motivation for the ABA's adoption of the subpoena rule; the law of attorney-client privilege is clearly narrower than the ethical duty of confidentially and the protection desired by the bar for the attorney-client relationship.

Second, client identity and fee information, information widely sought through attorney subpoenas, is generally not shielded by the attorney-client privilege.[363] Such information is usually not communicated for the purpose of obtaining legal advice; in cases where fees are paid by someone other than the client, fee arrangements often are not made with the client at all. Those jurisdictions recognizing exceptions to the general rule that such information is not privileged emphasize the narrowness of the exceptions.[364] The general rule is so well established, in fact, that the Second Circuit chided an attorney for not being aware of it and for not explaining to his client the potential conflict that could arise.[365]

Third, the burden of establishing the availability of a privilege falls on the party asserting it.[366] This allocation accords with "the general rule that the burden of proof lies on 'the party asserting the affirm-

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359. *In re* Walsh, 623 F.2d 489 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980).

360. *Reyes-Requena*, 913 F.2d at 1127; *Slotnick*, 781 F.2d at 249; *Walsh*, 623 F.2d at 492-93; *In re* Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1013 (Murnaghan, J., dissenting), *dismissed as moot*, 697 F.2d at 112 (4th Cir. 1982).

361. *Walsh*, 623 F.2d at 493; *Harvey*, 676 F.2d at 1013.

362. *Walsh*, 623 F.2d at 493-94.

363. *Anderson*, 906 F.2d at 1488, 1492 (discussing exceptions and stating client identity and fee information are not privileged in every circuit); *Slotnick*, 781 F.2d at 248 (en banc); *see In re* Freeman, 708 F.2d 1571 (11th Cir. 1983).

364. *See In re* Grand Jury Matter (John Doe 1), 926 F.2d 348 (4th Cir. 1991); *Reyes-Requena*, 913 F.2d at 1124; *Anderson*, 906 F.2d at 1490.

365. *Slotnick*, 781 F.2d at 248. The court also pointed out that ethics rules warn against the conduct that leads to this conflict of interest—accepting payment of clients' fees from a third party. *Id.* at 248 n.6. Said the court, "[a]ware of the potential conflict at this initial stage of communication, the attorney and client later should not be heard to complain that disclosure of benefactor payments might chill their relationship of trust. This is a self-imposed problem that very well could have been avoided." *Id.* at 248.

366. *John Doe 1*, 926 F.2d at 348; *Reyes-Requena*, 913 F.2d at 1123; *Walsh*, 623 F.2d at 489; *Freeman*, 708 F.2d at 1575; United States v. Osborn, 561 F.2d 1334, 1339 (9th Cir. 1977).

ative of a proposition.' "[367] As a practical matter, only the attorney who is the subject of the subpoena will possess the facts needed to make a determination of privilege.[368] Where otherwise privileged information is sought under the crime-fraud exception to the privilege, the government must make a *prima facie* showing of criminal or fraudulent conduct and establish some relationship between the confidential communication and the conduct.[369] Such a showing, however, must be made to overcome a claim of privilege; it is not required unless and until the privilege is asserted.

The existence of a privilege against disclosure for confidential communications between an attorney and client for the purpose of obtaining legal advice is based on societal policies largely extrinsic to the justice system as a truth-seeking process. Its protection makes the truth-finding process more reliable because the privilege encourages full client disclosure, allowing an advocate to better present her client's case and fostering a vigorous clash out of which truth may better emerge.[370] On the other hand, the social choice to shelter certain relationships comes at substantial cost to the tribunal's fact-finding ability.[371] Hence, the limits of the privilege are narrowly drawn: "[T]hese exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."[372] By shielding an attorney from her obligation to testify, a subpoena rule expands the attorney-client privilege.

3. *Grand Jury's Investigative Function*

Whatever may be the reach of ethics rules that purport to affect trial procedures, such rules may not interfere with federal grand jury

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367. United States v. R. Enterprises, 111 S. Ct. 722 (1991) (Stevens, J., concurring).

368. Baylson v. Disciplinary Bd. of the Supreme Court of Pa., 764 F. Supp. 328, 340 (E.D. Pa. 1991); *contra In re* Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1009 (requiring preliminary showing by government because it alone knows nature of investigation, necessary to adjudicate a claim of privilege), *dismissed as moot*, 697 F.2d 112 (4th Cir. 1982).

369. *In re* Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985).

370. Stern & Hoffman, *supra* note 283, at 1826.

371. *E.g.*, 8 JOHN HENRY WIGMORE, EVIDENCE § 2291, at 554 (John McNaughton ed., 1961) (privilege is an obstacle to the investigation of the truth, with only indirect and speculative benefits, and "ought to be strictly confined within the narrowest possible limits); FAUST ROSSI & ABRAHAM ORDOVER, CASES AND MATERIALS ON EVIDENCE 667 (1991) (noting the inconsistency of privilege with the central underlying inclusionary policy of Federal Rules of Evidence, since privilege works to keep reliable, relevant evidence from the fact-finder).

372. United States v. Nixon, 418 U.S. 683, 710 (1974); *accord* Fisher v. United States, 425 U.S. 391, 403 (1976).

proceedings. Grand jury proceedings have been protected against numerous attempts to introduce adversary procedures,[373] and the Supreme Court this past term reaffirmed longstanding federal doctrine that "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings" is impermissible.[374]

> The multifactor test announced in *Nixon* [requiring the government to show relevancy, admissibility and specificity of evidence sought before the court would enforce a trial subpoena] would invite procedural delays and detours while courts evaluate the relevancy and admissibility of documents sought by a particular subpoena. We have expressly stated that grand jury proceedings should be free of such delays.[375]

By requiring the government to make a preliminary showing before it can subpoena an attorney before a grand jury, a subpoena rule violates this principle in several ways. The ABA model rule, for example, requires a prosecutor to show that the information sought is "essential to the successful completion of an investigation or prosecution." But a grand jury may inquire into "*all* information that *might possibly* bear on its investigation until it has identified an offense *or has satisfied itself that none has occurred.*"[376] Thus, the prosecutor need not—perhaps cannot—know in advance whether information sought will even be relevant, much less "essential."[377] Likewise, the grand jury will often not know until it concludes its deliberations whether it has enough information to return an indictment or no true bill. It may find its investigations built upon many pieces of information, each of which appears innocent or peripheral independently but all of which are necessary to support an indictment.[378] A grand jury is free to pursue cumulative evidence; how much information is enough and what is essen-

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373. *E.g.*, United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule does not apply to grand jury proceedings); Branzburg v. Hayes, 408 U.S. 665 (1972) (First Amendment provides no privilege against testifying for the press); Costello v. United States, 350 U.S. 359 (1956) (hearsay rule does not apply to grand jury proceedings); Blair v. United States, 250 U.S. 273 (1919) (challenges to investigative jurisdiction not available to grand jury witness).

374. United States v. R. Enterprises, Inc., 111 S. Ct. 722, 727 (1991) (quoting United States v. Dionisio, 410 U.S. 1, 17 (1973)).

375. *Id.*

376. *Id.* (emphasis added).

377. *See id.*

378. *See In re* Klein, 776 F.2d 628, 632 (7th Cir. 1985) ("A grand jury tracks down leads, and even innocent-looking information may be useful. If the grand jury has some information on a subject, it may seek more to confirm or contradict what it has. How much information is 'enough' is a matter for the judgment of the grand jurors and the prosecutors rather than the courts." (citing *In re* Sinadinos, 760 F.2d 167, 170-71 (7th Cir. 1985))).

tial is a matter for the grand jury and the prosecutors, not the courts.[379] Furthermore, a requirement for preliminary showings of need or heightened showings of relevance would impede the grand jury's efficiency by creating interruptions and delays while the government sought to prove its case.[380] Such showings would diminish the grand jury's effectiveness as well, since they would impair the secrecy of grand jury proceedings.[381]

4. *Federal Rules of Criminal Procedure*

a. *Grand Jury Secrecy*

Matters occurring before a federal grand jury generally are, by federal law, secret.[382] A government lawyer is permitted to disclose grand jury matters when so directed by a court,[383] but to do so may seriously hamper the grand jury's operation because it reveals the subject of the grand jury's investigation.[384] The secrecy of grand jury proceedings serves several purposes: preventing flight by investigation targets, guarding against witness and juror tampering, encouraging full witness disclosures, fostering unfettered grand jury deliberations, and safeguarding the reputations of persons accused but exonerated.[385] The Supreme Court has stressed the indispensability of secrecy in grand jury proceedings in refusing to require detailed disclosure of reasons underlying a grand jury subpoena.[386] Although a court may require a showing of need, relevance, and proper purpose to withstand a motion to quash a *trial* subpoena,[387] the Court specifically stated that no court may impose such requirements upon a grand jury subpoena.[388] An ethics rule that requires a prosecutor to disclose the need for information

379. *In re* Grand Jury Matter (Backiel), 906 F.2d 78, 88 (3d Cir.), *cert. denied*, 111 S. Ct. 509 (1990); *Klein*, 776 F.2d at 632.

380. *Backiel*, 906 F.2d at 88; *Klein*, 776 F.2d at 634; *In re* Grand Jury Subpoena Served Upon Doe (Slotnick), 781 F.2d 238, 248 (2d Cir. 1985) (en banc), *cert. denied sub nom.* Roe v. United States, 475 U.S. 1108 (1986).

381. *Backiel*, 906 F.2d at 88; *Slotnick*, 781 F.2d at 248.

382. FED. R. CRIM. P. 6(e).

383. FED. R. CRIM. P. 6(e)(3)(C)(i).

384. *In re* Sinadinos, 760 F.2d 167, 170 (7th Cir. 1985); *Slotnick*, 781 F.2d at 248.

385. *See* United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 n.6 (1958); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979).

386. United States v. R. Enterprises, Inc., 111 S. Ct. 722, 727 (1991).

387. *See* United States v. Nixon, 418 U.S. 683, 699-700 (1974) (setting forth test to determine whether a trial subpoena duces tecum is unreasonable or oppressive under Federal Rule of Criminal Procedure 17(c)).

388. *R. Enterprises*, 111 S. Ct. at 726-27.

sought and its unavailability from other sources directly controverts this federal case law.

b. Issuance of Subpoenas

Federal law provides for the issuance of subpoenas in federal criminal proceedings. Under Rule 17(a) of the Federal Rules of Criminal Procedure, the clerk of court shall issue a subpoena in blank to the party requesting it, who shall fill it in before it is served.[389] In *United States v. Klubock*, the district court avoided the conclusion that an ethics rule requiring judicial approval before a prosecutor may "subpoena" an attorney is inconsistent with Rule 17. The court held that the subpoena rule did not prevent the *issuance* of the subpoena so long as judicial approval was obtained sometime prior to *service*.[390] Other courts, however, reject this narrow interpretation of the effect of a subpoena rule.

> Rule 17(a), of course, makes no allowance for judicial involvement in the issuance and service of subpoenas. . . [S]ilence regarding court intervention cannot be construed as an invitation to assign judges new functions in the grand jury subpoena process.[391]

Under Rule 17(c), a court "*on motion* made promptly *may* quash or modify the subpoena if *compliance would be unreasonable or oppressive*."[392] The rule provides the procedure and the substantive standards, and dictates the burden of proof, all of which are also set forth in the subpoena rule. Thus, where the ethics rule requires scrutiny of attorney subpoenas in every case, the federal rules provide for examination only upon motion by the witness. Where the ethics rule directs a court to examine particular factors such as privilege, need, and alternative sources of information, the federal rule articulates a broad standard of reasonableness. Where the ethics rule requires a prosecutor to establish negative propositions, such as the nonexistence of certain conditions, the federal rule requires the witness to establish affirmative ones. Finally, where the ethics rule is framed as a directive, the federal rule is permissive.

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389. FED R CRIM P 17(a).

390. 639 F. Supp. 117, 120 & n.8 (D. Mass.), *aff'd*, 832 F.2d 649 (1st Cir. 1986), *vacated*, 832 F.2d 664 (1st Cir. 1987) (en banc by an equally divided court).

391. Baylson v. Disciplinary Bd. of the Supreme Court of Pa., 764 F. Supp. 328, 346-47 (E.D. Pa. 1991).

392. FED R CRIM P 17(c) (emphasis added).

Under Rule 17(c), any witness may challenge a subpoena through a motion to quash; a further opportunity to challenge is available through resisting the government's motion for an order enforcing a subpoena or a show cause petition seeking a contempt citation. Thus the government may be required to justify any subpoena. To the extent that a subpoena rule may be interpreted as requiring judicial approval at one of these phases of the enforcement process, it may present no conflict with the federal rules. Several principles, however, affect the showing that a court may require. One is the established rule that one asserting a privilege, including an attorney-client privilege, bears the burden of establishing it. Another is the principle that a presumption of "regularity" or lawfulness attaches to a subpoena issued in conformity with the rules, and one controverting that presumption bears the burden of proving a claimed irregularity with particularity. Some minimal showing of relevance of the information sought, such as simply the general subject of the grand jury's investigation, may be a permissible requirement. Ultimately, the government bears the burden of persuasion that a reasonable possibility exists that the category of materials sought will produce information relevant to the general subject of investigation. A court unable to find this minimal level of relevance may quash a grand jury subpoena as unreasonable.

States cannot impose duties or procedures on federal courts. That the subpoena rule is a directive to courts, not simply attorneys, is illustrated by the ABA report accompanying the model rule recommendation: the rule specifies matters "that must be considered in *granting* [judicial] approval" (rather than in *seeking* approval) and provides that "*the court* evaluat[e] the propriety of the subpoena . . . in . . . an adversarial hearing" (rather than directing the prosecutor to seek an adversary hearing or to offer counsel an opportunity for an adversary hearing).[393] The *Baylson* court, evaluating Pennsylvania's subpoena rule, recognized this:

> As the Rule and its comment attest, Rule 3.10 is only nominally addressed to the conduct of government attorneys. It requires as a predicate the erection of novel court procedures and . . . commands the court to evaluate five factors to ascertain whether service of an attorney subpoena is proper. Stated another way, Rule 3.10 initially creates a rule of criminal procedure that contains evidentiary standards for judicial review and then impresses an ethical duty upon prosecutors to adhere to that procedure.[394]

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393. ABA Crim. Justice Section Report to the House of Delegates 2 (1990).

394. *Baylson*, 764 F. Supp. at 337. In *United States v. Klubock*, Judge Breyer also noted

The Supreme Court, in *In Re Snyder*,[395] made clear that while a federal court may hold an attorney practicing before it to the state code of professional responsibility, the state code would not apply of its own force to sanctions in federal courts. The Court emphasized that standards imposed by federal courts are a matter of federal law, even though admission to a state bar is made a prerequisite for admission to the federal bar by other federal law.[396] Emphasizing federal authority over federal courts, the Court stated more recently that "disqualification from membership from a state bar does not necessarily lead to disqualification from a federal bar."[397]

Sperry v. Florida[398] established that, under the Supremacy Clause, a state ethics rule must fall if it conflicts with federal law.[399] In *Sperry*, the Supreme Court held that a Florida ethics rule forbidding the practice of law by non-attorneys was inconsistent with federal law when applied to a practitioner before the United States Patent Office.[400] In that case, patent office regulations authorized non-lawyers to pursue patent applications before the Patent Office.[401]

If a federal statute or a valid rule of the Department of Justice authorized federal law enforcement officials to subpoena attorneys without any preliminary showings, the Supremacy Clause would bar a state from enforcing the disciplinary rule because otherwise the state disciplinary board would possess a "virtual power of review over the federal determination that a person or agency is qualified and entitled to perform certain functions . . ."[402] If a state bar association seeks to discipline a federal government attorney who is a member of its bar for violating its local subpoena rule, the attorney could remove any resulting litigation to federal court.[403] Such disciplinary proceedings could

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that the subpoena rule directs courts to create a prior approval procedure and that the Supremacy Clause forbids a state from requiring a federal court to adopt particular procedures. United States v. Klubock, 832 F.2d 649, 675 (1st Cir. 1986), *vacated*, 832 F.2d 664 (1st Cir. 1987) (en banc) (Breyer, J., dissenting).

395. 472 U.S. 634 (1985).

396. *Id.* at 645 n.6.

397. Frazier v. Heebe, 482 U.S. 641, 647 n.7 (1987).

398. 373 U.S. 379 (1963).

399. *Id.* at 383-84.

400. *Id.* at 385.

401. *Id.* at 384 (citing 37 C.F.R. § 1.31).

402. *Id.* at 385.

403. 28 U.S.C. §1442(a)(1) (1988) (providing removal jurisdiction for litigation involving federal officers who are acting under color of federal law); *see* Kolibash v. Committee on Legal Ethics, 872 F.2d 571 (4th Cir. 1989) (state disciplinary proceeding against a United States Attorney is removable under 28 U.S.C. § 1442); *but see* Franklin D. Cleckley, *Clearly Erroneous: The*

theoretically arise from a violation of a state ethics rule in two situations: a) where a federal court did not deem the attorney's conduct to violate its rule, but the state bar found a violation of the state rule, or b) where a federal court did not have a rule against the particular conduct but the state did.

In the former case, where the federal rule has not been violated, the Supremacy Clause would preclude the state bar from in effect overruling the judgment of a federal court.[404] In the latter instance, where only a state court rule is involved, a federal court may allow the state to proceed with disciplinary action on the theory that the state rule is controlling in absence of a contrary federal standard. In any case not provided for by rule, Rule 57 of the Federal Rules of Criminal Procedure authorizes the court to regulate its practice in any manner not inconsistent with the federal rules or district rules. It is unclear whether a federal court in this instance could prevent state disciplinary action. The Supreme Court has stated that its authority (and so, presumably, a lower federal court's authority) over state bar regulation is limited to enforcing federal constitutional requirements.[405]

C. *Legal Authoritativeness of Federal Rule*

The Supremacy Clause is not implicated when federal court rules are enforced against federal prosecutors. But troublesome questions are presented as to the extent of federal judicial supervisory powers in circumstances where the exercise of this authority conflicts with other federal law, transplants ethical issues into collateral proceedings, or fosters lack of uniformity among basic federal practices supposedly controlled by uniform rules.

Grand jury powers and activities provide a clear illustration of the overlapping and conflicting authority of judicial supervisory authority, constitutional law, statutes, uniform rules of procedure, and executive branch authority. The grand jury is subject to judicial supervision,[406] and it requires a court's assistance to enforce its process.[407] Although

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Fourth Circuit's Decision To Uphold Removal of a State-Bar Disciplinary Proceeding Under the Federal-Officer Removal Statute, 92 W. VA. L. REV. 577 (1990) (harshly criticizing the *Kolibash* decision).

404. *See supra* note 275 and accompanying text.

405. *Frazier*, 482 U.S. at 647 n.7.

406. Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

407. *In re* Klein, 776 F.2d 628, 634 (7th Cir. 1985); *In re* Grand Jury Proceedings (Schofield I), 486 F.2d 85, 90 (3d Cir. 1973).

uniform federal rules establish procedures for the use of judicial process, courts supplement and even override the rules pursuant to this authority.[408] The grand jury is essentially an aid to the prosecutor, however, and its function is an investigative one. In his investigative capacity, a prosecutor is generally considered an executive branch officer, and not a judicial officer. Thus the prosecutor's authority is implicated. Courts generally recognize that the decision of what to bring before a grand jury rests within the sound discretion of a prosecutor. Decisions on what and how much information to seek are for grand jurors and prosecutors, not courts. But the availability and utility of that information are affected by statutes and constitutional law relating to privilege, right to counsel, and procedure.

Most circuits have rejected any requirement of a government showing before a lawyer can be required to appear before a tribunal.[409] Others have supported some showing before any witness can be required to testify, but rejected a heightened standard as applied to attorneys.[410] Whether or not federal courts have authority to adopt attorney subpoena procedures under their local rulemaking or supervisory powers, most have declined to do so for a variety of reasons.[411] Their concerns highlight the tension between the policies informing legal doctrine, and those motivating ethics rules.

Assuming that federal judicial authority does extend to matters regulated by a subpoena rule, the existence of such a rule should not be construed to create rights in third parties. As the court recognized in *Baylson*, disciplinary rules are only intended to define and to allow adjudication of claimed violations of professional standards; they are not intended to modify legal practice in other contexts by imposing rules of

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408. For example, although the Federal Rules of Criminal Procedure only provide for quashing a subpoena *duces tecum*, courts will also quash a subpoena *ad testificandum*. United States v. Klubock, 639 F. Supp. 117, 123 (D. Mass.), *aff'd*, 832 F.2d 649 (1st Cir. 1986), *vacated*, 832 F.2d 664 (1st Cir. 1987) (en banc by an equally divided court).

409. *Klein*, 776 F.2d 628; *In re* Grand Jury Subpoena Served Upon Doe (Slotnick), 781 F.2d 238 (2d Cir. 1985) (en banc), *cert. denied sub nom.* Roe v. United States, 475 U.S. 1108 (1986); *In re* Grand Jury Proceedings (Weiner), 754 F.2d 154 (6th Cir. 1985); *In re* Freeman, 708 F.2d 1571 (11th Cir. 1983); *In re* Walsh, 623 F.2d 489 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980).

410. *In re* Grand Jury Matter (Backiel), 906 F.2d 78, 88 (3d Cir.), *cert. denied*, 111 S. Ct. 509 (1990) (must meet the *Schofield* requirement of affidavit showing relevance); *In re* Grand Jury Proceedings (Anderson), 906 F.2d 1485 (10th Cir. 1990) (must meet the *Dorokee* relevance requirements to provide subpoenaed witness with adequate notice).

411. *In re* Grand Jury Subpoena Served Upon Attorney Representing Criminal Defendant Reyes-Requena, 913 F.2d 1118, 1129 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 1581 (1991); *Klein*, 776 F.2d at 634; *Slotnick*, 781 F.2d at 247; *Weiner*, 754 F.2d at 154.

evidence or procedure.[412] A valid subpoena rule, fully applicable in a disciplinary context, does not create grounds for quashing a subpoena.[413]

V. CONCLUSION

The bar's normative vision of the law of lawyering has long been at odds with that embodied in the positive law of the state and federal governments. For the most part these disparate views are concealed by the general language of ethics rules and a reluctance of both bar associations and government officials (who are also lawyers) to engage in confrontation.[414] Increasingly, however, the conflict is being exposed along fracture lines revealed by efforts of the federal government to combat white-collar and organized crime. By 1990, the ABA and the Justice Department were engaged in rhetorical warfare, the former condemning the latter for its "sheer arrogance"[415] and the latter accusing the former of attempting to "stymie criminal investigations."[416] The bar relies on ethics rules promulgated in the states by a process in which it has a predominant influence; the federal government appeals to federal courts to vindicate the federal interest in effective and uniform law enforcement.

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412. Baylson v. Disciplinary Bd. of the Supreme Court of Pa., 764 F. Supp. 328 (E.D. Pa. 1991).

413. United States v. Klubock, 639 F. Supp. 117, 120 (D. Mass.), *aff'd*, 832 F.2d 649 (1st Cir. 1986), *vacated*, 832 F.2d 664 (1st Cir. 1987) (en banc by an equally divided court).

414. The organized bar has shifted its position dramatically on the issues considered in this article. Some years ago the American Bar Association was unlikely to side with positions advanced by criminal defense lawyers and opposed by the Attorney General, all state attorneys general, and the association of district attorneys. The leadership of the legal profession was largely drawn from the ranks of those who advised and counseled corporations and propertied interests; they tended to look down on litigation generally and the criminal defense bar in particular. This is illustrated by the history of the ABA's consideration of subpoenas to lawyers. *See supra* note 297. As late as the 1980s, the ABA tended to take a "law and order" position on these issues. What has happened to change its position? The infusion of hundreds of thousands of younger, and usually more liberal, lawyers has changed the ABA's political complexion. Perhaps more importantly, litigation has become the staple business of most large corporate law firms that contribute so extensively to the ABA's leadership. Increasingly, the more adversarial attitudes of litigators are dominant in law firm and bar association councils. Finally, RICO and other white collar crime initiatives have had a substantial effect. Major law firms now are involved in defending their corporate clients on criminal charges, a role that would have been unheard of some years ago. *See* Margaret C. Fisk, *White-Collar Boom*, NAT'L L.J., Dec. 2, 1991, at 1, 44-47 (discussing white-collar criminal practice in major law firms).

415. 6 Laws. Man. on Prof. Conduct (ABA/BNA) 25, 27 (Feb. 28, 1990) (statement of Marna Tucker).

416. Joint Press Release of Aug. 6, 1990, *supra* note 1.

The rationales offered to support ethics rules that undercut federal constitutional and statutory law share an appeal to platitudinous notions of the legal system.

> Proper operation of our adversary system of justice requires full recognition and protection of the relation of trust and confidence between a client and attorney.[417]
> The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.[418]

In what sense do the anti-contact and subpoena rules make the legal system operate "properly" or function "best?" Both rules operate to reign in government lawyers, primarily as criminal prosecutors but also as civil litigators. In civil litigation the anti-contact rule has a reciprocal quality, but in the criminal justice field it applies only to prosecutors (i.e., it does not prevent criminal defense lawyers from contacting police or other government personnel). The subpoena rule by its terms applies only to prosecutors.

These rules are attempts to ensure that a defendant receives meaningful assistance of counsel, in which, from the profession's standpoint, a protected attorney-client relationship is an integral element. Assistance of counsel is a constitutional guarantee, not simply a social policy, entitled to protection and respect. The contours of such assistance, however, have different dimensions in the visions of the bar, on the one hand, and positive law on the other.

The normative vision offered by the bar is a contradictory one. Its view of defense counsel's role is dominated by the adversarial ethic, almost to the exclusion of all else—including truth.[419] Thus, the de-

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417. ABA Crim. Justice Section Report to the House of Delegates 5 (1990).

418. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-18 (1969).

419. *See, e.g.*, Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474-82 (1966) (concluding that attorney has ethical duty to discredit a witness knowing his testimony to be truthful, to allow client to perjure himself without disclosing the perjury to the court, and to give legal advice knowing it may tempt a client to perjure himself); Marvin E. Frankel, *The Search for The Truth: An Umpireal View*, 123 U PA L REV 1031 (1975) (criticizing the adversary system's disregard for the truth-seeking function of trials and proposing imposition of affirmative duties on lawyers to aid in truth-seeking process); *see also* A. Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J 921 (to improve the truth-seeking function of trial, changes in rules of evidence and procedure are needed, not simply in ethics rules); Albert W. Alschuler, *The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel*, 54 COLO. L. REV. 67 (1982) (suggesting judges, legislators and rulemakers assume greater responsibility for producing truthful outcomes at trial, leaving attorney-client privilege intact); Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975) (respect for individual dignity re-

fense lawyer's role is not merely to protect innocent defendants and ensure an accurate outcome; her duty is "to do everything ethically proper to see that the client receives the most favorable outcome possible—whether or not it produces an outcome which society considers just."[420] On the other hand, the bar's views of the prosecutor's role and the functions of legal process are tempered by other values, such as respecting individual dignity and minimizing the likelihood of erroneous convictions. Thus the prosecutor, as an agent of the government, has a duty to ensure a just result, and has obligations to the defendant as well as to the public.[421] Moreover, to foster the adversary process, the bar views the legal system as duty-bound to eliminate the inherent imbalance favoring the government by virtue of its superior powers and resources, so as to "level" the playing field.[422]

Some argue that this vision of the trial as a sporting contest appeals to the public's sense of fairness, enhancing public acceptance of law as society's method of dispute resolution.[423] Viewing legal process as a sporting contest, it is no wonder that advocates call for equal participants and neutral rules, demanding that each side have "an equal opportunity to emerge victorious upon presentation of the 'best case' "[424] or that the defense at least be given a fighting chance.[425] However, more than eighty years ago, Roscoe Pound argued persua-

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quires that truth-seeking be subordinated to other ends despite resulting distortion of truth); H. Richard Uviller, *The Advocate, The Truth and Judicial Hackles*, 123 U. PA. L REV. 1067 (1975) (truth distortion is not inherent in adversary model; ethics rules should target specific excesses of advocacy). The irony in this view is that the adversarial process traditionally has been defended as superior to the inquisitorial model at *ascertaining truth*.

420. William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181, 200 (1984).

421. The prosecutor's obligation to seek justice rather than convictions is elaborated in ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1986), Standard 3-1.1.

422. *See* Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019 (1987) (questioning whether the adversary system includes rights to certain trial procedures and rules for the state); Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L J 1149 (1960) (arguing that defendants suffer an unfair disadvantage in the adversary system).

423. *See, e.g.*, Barbara Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1982).

424. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 1361 (7th ed. 1990).

425. *See, e.g.*, James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 980-82 (1986). Joseph Grano argues that the bar's preoccupation with the sporting analogy has led to the imposition of rules designed to make prosecution more difficult simply for the sake of creating a more equal contest. *See generally* Joseph D. Grano, *Implementing The Objectives of Procedural Reform: The Proposed Michigan Rules of Criminal Procedure—Part I*, 32 WAYNE L. REV. 1007 (1986).

sively that this "sporting theory of justice" actually undermines public confidence in and respect for the legal system.[426] The profession's myopic focus on the adversarial aspect of the legal system has obscured the ultimate goal of achieving a just result. Joseph Grano puts it aptly: "Equality between contestants makes for good sports, but in a criminal investigation we should be seeking truth rather than entertainment."[427]

In the debate regarding the proper scope and effect of ethics rules, rhetoric about "playing by the same rules" is commonplace. Regarding the *Lopez*[428] decision, for example, a spokesman for the National Association for Criminal Defense Lawyers said "[h]ere is a concept any schoolboy understands—if you have two teams on the field, both have to play by the same rules."[429] Yet from the differing visions the defense bar offers of the roles of defense and prosecuting counsel, it is clear that very different rules and norms guide the conduct of the different players. And, as Richard Uviller points out, no one would suggest that fairness to the weaker side, when that side is the prosecution, requires that it be given any compensation to equalize its chances for a conviction; or that defendants with ample resources have less claim than indigent defendants to procedural advantages conferred in order to redress imbalances between the government and the accused.[430]

Positive law has largely rejected the "fair fight" model of the legal process and the lawyer's role.[431] The legal vision of a fair trial is defined by the elements set forth in the Sixth Amendment; counsel's role is to provide the assistance "necessary to justify *reliance on the outcome* of the proceeding."[432] The Supreme Court has made clear that

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426. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A B A REP. 395, 404-06 (1906).

427. Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 677 (1986).

428. United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991).

429. Fred Strasser, *Thornburgh Exemption is Rebuked*, NAT'L L.J. 3, 33 (June 10, 1991) (quoting Gerald H. Goldstein, vice president of the Nat'l Ass'n of Crim. Defense Lawyers).

430. Uviller, *supra* note 117, at 1137, 1175.

431. In some respects the Supreme Court's decisions on constitutional criminal procedure reflect rather than negate the "fair fight" model of adversary justice. Decisions authorizing lawyers to make decisions on behalf of clients and treating waiver of constitutional rights as a once-and-forever matter tend to reinforce the litigation-as-a-game model and to increase client dependence upon lawyers. These decisions indicate that the Court waivers on the relative value to be given to "defendants' rights" and truthful outcomes. *See supra* notes 149-52. Nevertheless, there are important differences between the Court's vision and that of the legal profession, the former giving far more weight than the latter to truthful outcomes.

432. Strickland v. Washington, 466 U.S 668, 692 (1984); *see also* Kimmelman v. Morrison, 477 U.S. 365, 396 (1986) (Powell, J., concurring) ("The very premise of our adversary system of

defense counsel's duty is "limited to . . . conduct compatible with the very nature of a trial as a search for truth."[433] The law rejects the sporting model's implications for the conduct at issue in situations involving the subpoena or anti-contact rules. The constitutional guarantee of the assistance of counsel does not prohibit contact between a prosecutor and a represented client in many circumstances in which the profession deems contact unethical.[434] Likewise, neither statutory nor common law attorney-client privilege, federal grand jury rules, nor the right to counsel, prohibit subpoenas to attorneys.[435]

The vision of lawyering embodied in ethics rules purporting to restrict the fact-gathering authority of federal law enforcement officials conflicts with positive law as well as with considerations of ordinary morality. Positive law generally provides that unprivileged evidence of crime should be brought to bear so that law enforcement officials, grand juries, and trial courts can perform their essential functions in ascertaining whether crimes have been committed. Getting at the truth has a higher priority in the law than it does with lawyers, who are engaged in the management and control of information that may be harmful to client interests. The state, therefore, while respecting the lawyer-client relationship and the role of lawyers in securing ordered liberty, maintains that lawyers, like other persons, are subject to and not above the law. The grand jury and other tribunals with powers of testimonial compulsion are entitled to information that does not fall within the attorney-client privilege, even if that evidence incriminates the client.

Activities done as a lawyer, if done knowingly to conceal or suppress evidence to which a tribunal is entitled, may be punished as an obstruction of justice.[436] And facilitating a client's crime or fraud may

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criminal justice is that partisan advocacy on both sides of a case will best promote *the ultimate objective that the guilty be convicted and the innocent go free.*") (citing Evitts v. Lucey, 469 U.S. 387, 394 (1985)).

433. Nix v. Whiteside, 475 U.S. 157, 175 (1986) (holding that violation of client confidentiality, where attorney refused to allow client to perjure himself, did not constitute ineffective assistance of counsel).

434. *See supra* notes 135-48, 153-57 and accompanying text.

435. *See supra* notes 344-92 and accompanying text.

436. *E.g.*, United States v. Cintolo, 818 F.2d 980 (1st Cir. 1987) (upholding lawyer's conviction for obstructing justice where lawyer advised his client, who had a valid grant of immunity, not to testify before a federal grand jury. There was evidence that the lawyer's purpose was a corrupt one—to prevent the grand jury from finding out about the criminal activities of others). In amicus briefs, two bar associations complained that the lawyer was being punished for zealous advocacy in advising his client. *Id.*

lead to civil and criminal charges as a principal, as a co-conspirator, or as one who aids and abets another's law violation. Thus the lawyer, for example, must: (1) turn over physical evidence of crime to the state unless it can be returned to its source without impairing its evidentiary quality or risking its destruction;[437] (2) provide unprivileged information in response to a valid subpoena, information that may include client identity, fee information, and information *within* the lawyer's *ethical* duty of confidentiality that is not given legal protection by the judicially-enforced attorney-client privilege;[438] and (3) disclose in some situations the client's continued or future criminal or fraudulent activity.[439]

The bar argues that the Department of Justice is attempting to put itself above the law by refusing to abide by generally applicable rules of professional ethics. The ultimate question is whether, in the instances that have led to controversy, it is really governance of the professional relationship in court proceedings that is at stake. Professional ethics is a broad terrain that spills over into unauthorized practice and other non-courtroom matters. The arguments over the anti-contact and subpoena rules are really ones of classification and hegemony: may rules of ethics proposed by the bar be expanded to regulate the fact-gathering activities of law enforcement agencies? By shifting the debate to that of lawyers' ethics, the bar gains the benefit of the view that legal ethics is primarily a matter for state courts, or at least for courts alone. Ethics rule-making, in which the bar has a privileged position, plays a more dominant role. Policies embodied in other law, including judicially-created law, are eclipsed. Institutional decision-making is shifted from a federal arena in which the executive, the grand jury, Congress, and federal courts are active participants, to state courts and federal district courts.

These consequences result in ethics rules that give insufficient weight to the interests of others—clients, law enforcement authorities, and the public generally. The question is whether, by pushing ethics rules that make client consent irrelevant (the anti-contact rule) and provide special procedures for lawyers (the subpoena rule), it is the profession which seeks to put itself above the law.

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437. *See supra* note 65.
438. *See supra* notes 75-79, 278-80 and accompanying text.
439. *See supra* notes 278-80 and accompanying text.